92-990

No. 92-_____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GARNER GREGORY, ADMINISTRATOR OF THE ESTATE OF JOE EDWIN GREGORY; BEATE GREGORY, individually and as mother and next friend of JOE RAY GREGORY; and DONNA MAE FIELDS,

Petitioners,

v.

THE CITY OF ROGERS, ARKANSAS; PTL. RONNIE HOWELL, individually and in his capacity as a police officer of the City of Rogers, Arkansas; and IMPERIAL CASUALTY AND INDEMNITY CO.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the six judge majority of the Eighth Circuit sitting en banc, in passing on Respondents' Motion for Summary Judgment, properly applied the presumption that the non-moving party's evidence is believed and all justifiable inferences are to be drawn in that party's favor when, despite contrary action by it's unanimous three judge panel and over a five judge en banc dissent, the majority affirmed the district court's dismissal of the case?

2. Whether the decision of the six judge majority of the Eighth Circuit sitting en banc, apparently in conflict with decisions of the Ninth and Third Circuits, properly applied to the facts in this case this Court's decision in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), that the Constitution does not ordinarily impose affirmative obligations on government to protect a person's bodily security?

3. Whether the Eighth Circuit, as decided in this case, properly limits all substantive due process violation of bodily security claims to those in which the defendant has engaged in reckless or intentional conduct, even when the injured plaintiff is not a person who is constrained, involuntarily or voluntarily, by government?

4. Whether the decision of the six judge majority of the Eighth Circuit sitting en banc, which is apparently consistent with decisions of the Second, Third, Fourth and Seventh Circuits but in conflict with those of the Sixth and Tenth Circuits, correctly held that a municipality cannot be liable under Section 1983 for violating a person's federal rights when no individual agent of the municipality himself has also violated the person's federal rights?

PARTIES TO THE PROCEEDINGS

Counsel of record certify that the following listed persons have a direct interest in the instant case:

1. GARNER GREGORY, ADMINISTRATOR OF THE ESTATE OF JOE EDWIN GREGORY.

2. BEATE GREGORY, individually and as mother and next friend of JOE RAY GREGORY.

3. DONNA MAE FIELDS.

4. THE CITY OF ROGERS, ARKANSAS.

5. PTL. R0NNIE HOWELL, individually and in his capacity as a police officer of the City of Rogers, Arkansas.

6. IMPERIAL CASUALTY AND INDEMNITY CO.

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OPINIONS BELOW

The October 27, 1989 Order of the United States District Court for the Western District of Arkansas sua sponte dismissing plaintiffs' claims for lack of subject

matter jurisdiction is not published. It is reprinted in the Appendix at A-38. For the Court's convenience, as the District Court issued no findings of fact and conclusions of law, the transcript of October 20, 1989 proceedings referred to in the District Court's Order is reprinted in the Appendix at A-39 to A-46.

The December 12, 1990 unanimous decision of the panel of the United States Court of Appeals for the Eighth Circuit, reversing the District Court's dismissal order and remanding the case is reported at 921 F.2d 750 (9th Cir. 1990). It is reprinted in the Appendix at A-21 to A-37.

The September 9, 1992 six to five en banc opinions of the United States Court of Appeals for the Eighth Circuit, affirming the District Court, are reported 974 F.2d 1006 (8th Cir. 1992) (en banc). They are reprinted in the Appendix at A-2 to A-20.

The September 9, 1992 Judgment of the United States Court of Appeals for the Eighth Circuit is not reported. It is reprinted in the Appendix at A-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on September 9, 1992. This Petition for Writ of Certiorari is filed within ninety (90) days therefrom, and this Court's jurisdiction is invoked under 29 U.S.C. Section 1254(l).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The text of (1) Section 1 of the Fourteenth Amendment to the Constitution of the United States, (2) Section 1983, Title 42 U.S.C., and (3) Arkansas Code Annotated 12-11-110, are included in the Appendix at A-47 to A-49.

STATEMENT OF THE CASE

Petitioners filed their Complaint on March 27, 1989, and filed an Amended Complaint on June 23, 1989. They sought to recover damages on behalf of decedent Joe Edwin Garner ("Decedent") and Petitioner Donna Mae Fields ("Fields") against Respondent Ronnie Howell ("Howell") a police officer of the Respondent City of Rogers, Arkansas, and one other officer, Marty Pollock ("Pollock"), for injuries caused by the officers' "gross negligence" and their "reckless indifference to the safety of the Decedent and Fields." (Amended Compl. ¶22.) Petitioners also alleged, inter alia, that these police officers "knew or should have known that" Decedent was intoxicated, needed his designated driver and could not drive safely. (Id. at ¶14.) Petitioners also alleged that the police officers had acted under color of state law by affirmatively removing Decedent's and Fields' "designated driver" and placing them, while intoxicated, in a position of greater peril than they were in when Respondent Howell first encountered them. (Id. at ¶24.)

Petitioners also alleged that the police officers' actions were in accordance with "the stated custom, policy and procedure of the . . . City of Rogers . . .," and resulted from the City's failure "to properly supervise and train its police officers amounting to deliberate indifference to the

rights of persons with whom the police come in contact. . . ." (Id. at ¶¶24 & 25.) Petitioners also alleged that "the Defendants failed to execute their statutory duty to arrest intoxicated persons pursuant to A.C.A. §12-11-110." (Id. at ¶28 at p.10.) Petitioners alleged that the police officers' and City's actions caused decedent's and Fields' injuries in violation of their rights to life, liberty and property as protected by the Due Process Clause of the Fourteenth Amendment. (Id. ¶¶24, 25, 27.)

The Amended Complaint also alleged a pendant state claim for negligence against all defendants. Respondent Imperial Casualty and Indemnity was named as a defendant pursuant to Arkansas law and practice. Defendant Marty Pollock was voluntarily dismissed by Petitioners sometime after the Amended Complaint was filed.

The District Court dismissed the case on the very date set for trial. Thus, the allegations of the Amended Complaint had been clarified through discovery.

STATEMENT OF FACTS

Early in the morning on Sunday, March 30, 1986, Stanley Turner was driving Decedent's car. Decedent and Petitioner Fields were in the car. The three had been "partying" and Decedent and Fields had been drinking heavily, and were intoxicated. Turner, who was sober, was the group's designated driver.

Respondent Howell stopped Turner for running a red light at approximately 2:30 a.m. A second City of Rogers policeman, Pollock, arrived at the scene approximately one minute later to provide "backup" assistance.

Turner had pulled into a local McDonald's restaurant parking lot. Officer Howell ordered Turner out of the car. A warrant check on Turner showed an outstanding warrant for his arrest.

The events in the parking lot took about sixteen minutes. While in the restaurant parking lot, Turner told Howell that Decedent and Fields "had been drinking," had visited "some night clubs," had decided "to go out and 'party'" and that he was now driving them home. (A-24.) Turner also told Officer Howell that Decedent had gone out partying because Decedent was having problems with his wife.

Fearing that she and Decedent would be arrested for public intoxication, Fields told Decedent to be quiet and to avoid drawing attention to himself. Nevertheless, Decedent got out of the car. According to Officer Pollock, Decedent was not belligerent or argumentative, and got back into the car when asked to do so. From his position at the rear of the stopped car, Officer Pollock "did not notice anything peculiar about him." Fields remained in the car and had no contact with either officer. Officer Howell testified in an affidavit that "he was not aware that passengers in the [car] were intoxicated. They were not unruly. [He] observed no open containers [and] did [not] smell alcohol in the car or on their persons." (A-4.)

Fields had little memory of the evening. She could not recall whether "she did anything or took any action that would cause a police officer to arrest [her]." (A-5.) Yet she stated that she had several helium filled balloons in the car, at which she and decedent were batting "trying to keep them in the back [of the car when] they kept coming up over the back of the seat." Officer Pollock could not recall

seeing the balloons or hearing any noise coming from the Gregory car. (A-4.)

Officer Howell took Turner into custody, instructing him to drive Decedent's car and follow him to Respondent City's police station to deal with the warrant. Decedent and Fields were still in Decedent's car.

At 2:51 a.m., Officer Howell arrived at the police station, as did Turner. Officer Pollock, who had followed Turner to the police station, watched Turner park there and then resumed his duties elsewhere in the City.

Decedent and Fields were left in Decedent's care when Turner entered the police station with Officer Howell. Howell did not ask Turner about Decedent or Fields. He did he take any measures to secure them, even though Turner was to be detained and held for transport to another police department.

Approximately thirty minutes after Turner and Officer Howell had met inside the station, Decedent "drove the car away from the police station." (A-6.) Shortly thereafter, Officer Pollock received information over his radio from the police dispatcher to be on the lookout for "this vehicle that had driven off from the station and that the driver was probably going to be intoxicated." (A-24.) "Not much longer after that," according to Officer Pollock, "we received the call from the accident at Highway 62 and 102, injury accident." (A-24.)

The record does not reveal how the Dispatcher learned before the accident that "the driver was probably going to be intoxicated." (A-6.) Officer Howell testified in deposition that Decedent and Fields had driven off after the

accident. Testimony of Turner and the Police Dispatcher does not appear in the Record, although both people were subpoenaed by Petitioners to testify at trial.

At approximately 3:23 a.m, Decedent's car, driven by Decedent northbound on U.S. highway 62, went off the road, became airborne, and then landed 275 feet from the highway. Decedent died within the hour, leaving a wife and infant son. Fields sustained extensive injuries. Decedent's post-mortem blood alcohol content was .23%, more than twice the legal limit of .10%. Fields' blood alcohol content, measured two hours later, was .17%. (A-24.)

STATEMENT OF PROCEDURAL HISTORY

On October 4, 1989, Respondents filed motions for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. Petitioners' response was filed on October 13, 1989. Trial was to commence during the week of October 16, 1989. The case was called for trial on October 20, 1989.

On October 20, 1989, a jury venire had been called. Prior to voir dire in open court, relying on this Court's decision in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), the District Court determined that, because Decedent and Fields had never been in police custody, it had no subject matter jurisdiction. On that basis and making no other findings the Court granted Respondents' motions for summary judgment. (A-43 to A-45.) The District Court issued an Order on October 30, 1989, but made no written findings of fact or conclusions of law. (A-38.)

On December 12, 1990, a panel of the United States Court of Appeals for the Eighth Circuit unanimously reversed. Speaking through the Hon. William H. Timbers, sitting by designation, from the United States Court of Appeals for the Second Circuit, the panel held that the record reflected that "Officer Howell created the dangerous situation" that lead to Decedent's death and Fields' injuries. Hence it was not controlled by DeShaney. (A-28 to A-32 (emphasis in original).)

The panel also held that there were (1) "questions of fact as to whether or not Officer Howell's conduct was reckless" (essentially as "a proxy for intent") (A-33 to A-36) and thereby violated Decedent's and Fields' due process rights; (2) a jury question as to whether "the Officer's conduct was not the proximate cause of the accident." (A-36); and (3) "material questions of fact whether it was the custom of the Rogers Police Department that officers could use their discretion in deciding whether or not to arrest intoxicated individuals, despite the state statute requiring their arrest," thereby rendering the City liable under Section 1983 (A-36 to A-37).

A timely Petition for Rehearing and Suggestion of Rehearing En Banc was granted. On September 9, 1992, the Court of Appeals affirmed the district court's dismissal, by a vote of six to five. (Judge Timbers did not participate, as he had been on the panel by designation.)

In an opinion by Judge George G. Fagg purporting to apply this Court's teachings in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), the six judge en banc majority held that Petitioners had not presented "evidence sufficiently supporting the disputed material facts that a reasonable jury could return a verdict in their favor." (A-9

to A-14.) Distinguishing several decisions of Circuit Courts decided since this Court's DeShaney decision, the majority held that "[g]iven the record in this case, a reasonable trier of fact could not conclude that Officer Howell 'affirmatively place[d] [Decedent and Fields] in a position of danger.'" (A-14.)

To reach this conclusion, the majority held essentially that Officer Howell did not know (and should not have known) that Decedent and Fields were intoxicated, and that Turner, not Officer Howell, breached his duties to Decedent and Fields thereby "causing" the accident. (A-10 to A-13.) Thus, Petitioners' claim against Officer Howell did not give rise to a due process violation because he owed Decedent and Fields no duty and caused them no injury. (A-13 to A-14.)

Having thus affirmed the dismissal of the claims against the individual police officers, the majority held that Petitioners cannot press a claim against the City of Rogers for deliberate indifference based on inadequate training and following municipal policy or custom. (A-14.)

Senior Judge Gerald W. Heaney, who was on the original hearing panel, authored the five-person dissent, which also incorporated the unanimous decision of the three judge panel. (A-15 n.1.)

The dissenters observed that the majority implicitly conceded the adequacy of Petitioners' allegations to state claims against Officer Howell for violating Petitioners' constitutional rights. (A-15.) The dissenters would have reversed and remanded, as had the panel, because "the record when viewed in the light most favorable to the

plaintiffs contains sufficient evidence to withstand summary judgment." (A-15.)

The dissenters observed that, "[a]lthough the court sets forth the correct legal standards for evaluating the evidence presented below, it has neither viewed that evidence in the light most favorable to the plaintiffs nor drawn all justifiable inferences in the plaintiffs' favor." (A-15 to A-16.) The dissenters also observed that the majority judges misconstrued the cases upon which they relied to support the proposition that even though Officer Howell had been told that Decedent and Fields had "been drinking," "such a statement would not provide a jury with enough evidence to conclude that the officers were aware of their intoxication and unfitness to drive." (A-17 n.4.)

Thus the dissenters would have held that there was sufficient evidence for a "reasonable factfinder [to] find that the officers knew or recklessly disregarded the fact that Garner Gregory and Donna Mae Fields were intoxicated on the night in question," (A-16), and the officers therefore violated Gregory's and Fields' substantive due process rights by placing them in a position of greater danger than existed prior to police intervention. By the incorporation of the panel decision, the dissenters also would have remanded the claims against the City. (See A-36 to A-37.)

REASONS FOR GRANTING THE WRIT

At bottom, this case presents four unresolved, important and recurring issues, involving 42 U.S.C. Section 1983 and the Constitution, emanating from several decisions of this Court. Indeed, the six to five division of the en banc Eighth Circuit demonstrates both the closeness of the issues, the confusion engendered by this Court's relevant decisions that touch upon them, and their importance in federal jurisprudence. Moreover, some of the issues evidence conflicts among the Circuits.

I.

THIS CASE RAISES IMPORTANT RECURRING ISSUES OF THE PROPER APPLICATION OF SUMMARY JUDGMENT STANDARDS THAT THIS COURT SHOULD RESOLVE AND AS TO WHICH THERE IS CONFUSION WITHIN THE EIGHTH CIRCUIT AND AMONG THE CIRCUITS, ESPECIALLY IN CIVIL RIGHTS AND CONSTITUTIONAL LAW CASES.

The Eighth Circuit and the other Circuits remain inadequately instructed as to the meaning of this Court's summary judgment standards, especially as they apply in civil rights cases. Cf. Kodak Co. v. Image Technical Services, Inc., 504 U.S. ___, 119 L.Ed.2d 265 (1992).

The majority and dissent agreed to the statement of the summary judgment standards, articulated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). See also Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita

Electric Industrial Corp. v. Zenith Radio, 475 U.S. 574 (1986). (Compare A-3 (majority), with A-15 to A-16 (dissent).) However, they disagree radically as to their application.

Extraordinarily, in this case, twelve circuit judges (counting Judge Timbers) applied the same stated summary judgment standards to the exact same facts, and divided six to six on the result. By itself, this is strong evidence of Circuit Court confusion in the application of summary judgment standards. See also Schwarzer, Hirsch and Barrans, The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure, 139 F.R.D. 441 (1991); Comment, Overruling Tradition: Summary Judgment in the Eleventh Circuit After 1986, 41 Mercer L. Rev. 737 (1990).

In Anderson, Celotex and Matsushita, this Court rearticulated the summary judgment standards and clarified the process in order to render summary judgment more available for pretrial resolution. See, e.g., Proposed Amended Rule 56 and notes thereto; Issacharoff and Lowenstein, Second Thoughts About Summary Judgment, 100 Yale L.J. 73 (1990). As they play out, the new standards are tilted sharply in favor of defendants. Id. at 89-92; C. Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 Cornell L. Rev. 270, 334 (1989).

In this case, the dissenters believed with cause that the en banc majority had stood on its head this Court's instruction that the non-moving parties' evidence "[must] be believed, and all justifiable inferences [must] be drawn in [the non-moving party's] favor." (A-3 (majority) (quoting Anderson, 477 U.S. at 255)). As demonstrated by the

dissent: "Although the court sets forth the correct legal standards for evaluating the evidence below, it has neither viewed that evidence in the light most favorable to the plaintiffs nor drawn all justifiable inferences in the plaintiffs' favor." (A-15 to A-16.) Instead the majority simply explains away or ignores facts and justifiable inferences supporting Petitioners and speculates to create inferences that support Respondents.

Although not stated, the difference between the majority and dissenters may spring from this Court's direction in Matsushita that the permissible range of inferences that can be drawn are limited by the reasonableness of the inference in light of the substantive law underlying the claim. See Points II and IV, infra. In any event, the sharp division of the entire Eighth Circuit in this case demonstrates that the lower federal courts are seriously confused about the summary judgment standards and their application in civil rights cases.

By reviewing this case, this Court can provide essential instruction to guide all federal courts in the civil rights case context, about the proper application of the Anderson-Celotex-Matsushita summary judgment standards and procedures, and the meaning and vitality of the rule that all reasonable or justifiable inferences must be drawn in favor of the non-moving party.

II.

THIS CASE RAISES IMPORTANT RECURRING ISSUES OF THE PROPER APPLICATION OF THIS COURT'S DESHANEY DECISION, THAT THE CONSTITUTION DOES NOT ORDINARILY IMPOSE AFFIRMATIVE PROTECTIVE OBLIGATIONS ON GOVERNMENT, THAT THIS COURT SHOULD RESOLVE AND AS TO WHICH THERE IS CONFLICT AMONG THE CIRCUITS.

This case involves the metes and bounds of this Court's decision in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

As the en banc majority observed, after DeShaney, the Eighth Circuit had taken the position that "the Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." (A-8.) See Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990). Other Circuits have adopted the same essential position. See L.W. v. Grubb, 974 F.2d 119 (9th Cir. 1992); Medina v. City of Denver, 960 F.2d 1493, 1497 n.5 (10th Cir. 1992); Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), cert. denied, 494 U.S. 1066 (1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) (relying on White v. Rochford, 592 F.2d 381 (7th Cir. 1979)), cert. denied, ___ U.S. ___, 112 L.Ed.2d 305 (1990).

As noted above under Point I, however, the difference between the majority and dissenters in applying summary judgment standards may well be attributed to a difference in their understanding of the second post-DeShaney claim described by the Eighth Circuit as quoted in the paragraph above. Construing inferences against the non-moving party, the majority outlines a scenario in which only the designated driver, Turner, is at fault in this case. (A-12 to A-13.) (Interestingly, the scenario makes no mention of the "justifiable" inference that Turner was under arrest and therefore subject to the kind of stress that any police officer knew or should have known would impair his ability to focus on any obligations he may have had to Decedent and Fields.)

The majority concludes that since Turner caused the injuries, Officer Howell can not also have caused the injuries, and further that Officer Howell owed Decedent and Fields no duty. (A-13 to A-14.) The majority opinion is thus based on the notion that an injury has a sole cause and the injured person has a claim or claims against only the actor responsible for that cause.

There can, however, be several proximate causes for any injury and several actors who owed the victims a duty of care. For example, in Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), a police officer stopped a car, arrested the driver for drunk driving, and impounded the car. The car's passenger, Wood, was consequently left in a high crime area. After walking for a short time, Wood accepted a ride from a stranger, who subsequently took her to a secluded area and raped her. Although the rapist was indisputably a cause of the injury suffered by Wood (and subject to a tort action), the Ninth Circuit reversed a finding of summary judgment in favor of the police officer.

That court found that a genuine issue existed as to whether the officer was liable for affirmatively placing Wood in danger and then abandoning her. 879 F.2d at 596. See also L.W. v. Grubb, 974 F.2d 119 (9th Cir. 1992).

Likewise here, the issue of whether Turner's conduct created or escalated a danger to Decedent and Fields is not dispositive of the issue of whether Officer Howell's conduct also created or escalated a danger to them, and he also owed a duty of care to them. The possible liability of Turner does not purge the liability of Officer Howell and the City of Rogers. By holding otherwise, the Eighth Circuit's decision in this matter conflicts with the Ninth Circuit's position in Wood. Cf. Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989) (reversing summary judgment for defendants where plaintiff, employee of defendant Town, was abducted by inmates doing community work at town hall).

Interestingly, DeShaney does not by its terms address situations in which "the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." Nor does any subsequent decision of this Court. At best this Court reserved that issue. See 489 U.S. at 210 n.9. This case is an appropriate one for the Court to instruct the lower federal courts on this subject.

III.

THIS CASE RAISES IMPORTANT RECURRING ISSUES OF THE PROPER STANDARD OF CARE TO BE USED IN DEFINING THE SUBSTANTIVE DUE PROCESS RIGHTS TO BODILY SECURITY OF PEOPLE WHO ARE INJURED BY GOVERNMENT BUT WHO ARE NOT EMPLOYEES OF THE GOVERNMENT OR VOLUNTARILY OR INVOLUNTARILY CONSTRAINED BY THE GOVERNMENT.

This case presents the Court with an opportunity further to clarify the duty of care necessary to establish violations of the substantive due process right to bodily security of people injured by government. In this case, unlike others on which this Court has ruled, the plaintiffs are neither government employees, other persons who voluntarily submit to government power, nor persons involuntarily constrained by government.

The majority of the Eighth Circuit appears to limit all substantive due process violations, regardless of the status of the victim or the context, to intentional governmental acts that injure life, liberty, or property. The Panel (as by adoption the Dissent) expressly would apply a standard of "'recklessness' [as] a proxy for intent." (A-35.) See also Medina v. City of Denver, 960 F.2d 1493 (10th Cir. 1992) (reckless intent); Wood v. Ostrander, 879 F.2d 583 (9th Cir 1989) (1990) (applying a standard of deliberate indifference).

This Court has not yet spoken on the precise issue here. This Court has indicated that proof of mere

negligence may never suffice to make out a substantive due process violation. See Daniels v. Williams, 474 U.S. 327, 328 (1986) (prison custodial setting). In Daniels, however, the Court observed that "this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protections of the Due Process Clause." 474 U.S. at 334 n.3.

Within the prison custodial setting, substantive due process protection against bodily harm through imposition of excessive force requires a showing of subjectively intentional conduct evidence by actual malice. Whitley v. Albers, 475 U.S. 312 (1986); see Hudson v. McMillan, 503 U.S. ___, 117 L.Ed.2d 156 (1992). However, in Whitley the Court again left open the standard of care to be applied under substantive due process to protect bodily security from excessive force "outside the prison security context." 475 U.S. at 327.

Last term, in Collins v. City of Harker Heights, 503 U.S. ___, 117 L.Ed.2d 261 (1992), the Court held that an allegation that a municipality caused the death of a public employee due to its policy or custom of deliberate indifference to the employee's safety in the workplace was insufficient. In Collins, the Court accurately observed that the "complaint [did] not charge the city with a wilful violation of Collins rights[,] . . . that the city or any of its agents deliberately harmed [Decedent] [or] . . . that his supervisor instructed him to go into the sewer [where he died] when the supervisor knew or should have known that there was a significant risk that he would be injured." Id. at 273. The Amended Complaint here does contain such allegations.

Decedent in Collins was an employee of the city that his widow sued and he was killed within the course and scope of his employment. The Court acknowledged this context, for substantive due process purposes, by holding that substantive due process includes no public employee right to a safe working environment. 117 L.Ed.2d at 274-275. As the Court also observed, Collins personal representative could not maintain "that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment." 117 L.Ed.2d at 275.

Thus the Court has yet to address the standard of care that must be alleged and proven to sustain a claim for violation of substantive due process rights to bodily security of persons, like Decedent and Fields, who are not prisoners, detainees or otherwise involuntarily constrained by government, or public employees or others who voluntarily submit themselves to government power. This case thus provides the Court with an opportunity to address and clarify the standard of care that defines the substantive due process rights to bodily security of such persons--gross negligence, deliberate indifference, recklessness, or actual intent. See, e.g., W. Prosser and W.P. Keeton, Law of Torts 36, 209-14 (5th ed. 1984); Restatement (Second) of Torts §§ 8A, 282, 283, 500.

IV.

THIS CASE RAISES IMPORTANT RECURRING ISSUES CONCERNING WHETHER A MUNICIPALITY MAY BE LIABLE UNDER SECTION 1983 FOR VIOLATING A PERSON'S FEDERAL RIGHTS WHEN NO INDIVIDUAL AGENT OF THE MUNICIPALITY HAS HIMSELF ALSO VIOLATED THE PERSON'S FEDERAL RIGHTS.

The Eighth Circuit en banc majority held that "[h]aving concluded Officer Howell did not violate Fields's and Gregory's constitutional rights, [Petitioners] cannot press a claim against the City of Rogers," based on inadequate training and following municipal policy or custom that places persons with whom the police come in contact at risk. (A-14.) By adopting the Panel decision, the dissenters disagreed, particularly as to the claim that "it was the custom of the Rogers Police Department that officers could use their discretion in deciding whether or not to arrest intoxicated individuals, despite the state statute requiring their arrest [and] [i]n failing to detain Gregory and Fields . . . Officer Howell was acting in accordance with the custom." (A-36 to A-37.)

This Court should clarify whether a municipality's liability under Section 1983 for violating a constitutional right requires proof that an actual agent of the municipality is also personally liable. Emanations of such a rule are found in City of Los Angeles v. Heller, 475 U.S. 796 (1986) (per curiam).

In most cases, where a municipality violates a person's constitutional rights an individual municipal agent will also have violated that person's rights. Sometimes, however, a municipality's violation may not require that the agent also be liable. For example, to protect itself from liability, the municipality cannot assert immunities of its agents. Thus the agent may be immune from liability while the municipality is not. Brandon v. Holt, 469 U.S. 464 (1985). Cf. Heller. More significantly, an agent may be guilty of mere or slight negligence and therefore not be liable for violating substantive due process rights; yet the municipality may have actually caused the injury due to a policy or custom of deliberate indifference (or even knowingly or intentionally caused the injury). In that case, analytically, the municipality itself still could well be deemed to have violated its duty of care to the injured person, and therefore should be held responsible for violating the individual's federal rights.

In City of Canton v. Harris, 489 U.S. 378, 388 n.8 (1989), this issue was not reached. Had it been reached, it is possible the City of Canton would have been held liable for violating the plaintiff's substantive due process rights, through its policy and custom of systematically not training police personnel properly to identify and respond to detainees' health emergencies. In a situation such as the one presented in City of Canton, the municipal agents who, due to the city's failure to train, were ignorant of proper procedures may have been guilty of no more than mere (or slight) negligence. Presumably mere negligence does not create an individual's substantive due process liability. Yet, in such a City of Canton situation, is it so very clear, therefore, that the municipality which is guilty of deliberate indifference or intentional misconduct is also free of

liability, even though it caused serious injury to the plaintiff?

Like City of Canton, the instant case also presents the possibility of municipal liability in the absence of individual liability. Petitioners claim that the City had a policy or custom of unlawfully lodging in its police officers discretion not to arrest intoxicated persons, which lead to Decedent's and Fields' injuries. Cf. Tennessee v. Garner, 471 U.S. 1, 22 (1985) (individuals dismissed; possible liability, because of use of deadly force policy, of the Police Department and the City of Memphis "hinges on Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), . . . and is left to remand.")

The controlling Arkansas statute in this case affirmatively mandates, inter alia, that:

> It shall be the duty of all peace officers to arrest any insane or drunken person, whom they may find at large and not in the care of some discreet person. . . .

Arkansas Code Annotated § 12-11-110(a) (A-48.) The statute further mandates specific procedures leading to confinement, or delivery of any drunk person to "the custody of a discreet person." (A-48.)

Given the mandatory language of the statute, the burdens it imposes on police officers, and the usual burdens and constraints of police work, if condoned by City policy or custom, it is highly reasonable to infer that peace officers on patrol in the City would be inclined to turn a blind eye to all but the most intrusive drunks. The police officer would want to avoid the substantial work

involved in making arrests of unintrusive drunks. He or she would also not want "needlessly " to arrest or embarrass people who are drunk but not intrusive.

Indeed, that precise scenario is a "justifiable" inference from the facts in this case, even as recited by the en banc majority. Turner spoke to the police in street code, using words to the effect of "drinking," "partying" and night-clubbing. Officer Howell, like the Victorian Era wife in Oscar Wilde's play "The Constant Wife," chose not to acknowledge the truth, until he had to--when (we, the Eighth Circuit panel and en banc dissenters, would infer) he learned that Decedent and Fields drove off and, already knowing they were intoxicated, Howell told the radio dispatcher. (See A-19 (dissent).)

Addressing the issue of survivability of a Monell claim, the Circuit Courts have developed conflicting views on whether a municipality may be held liable when its agents and employees are not. Although their interpretations of Heller differ, most of these cases purport to draw support from Heller. Compare Doe v. Sullivan County, 956 F.2d 545 (6th Cir.) (rejecting argument that where claims are dismissed against officers based on their qualified immunity, Heller precludes liability against the municipality), cert. denied, __ U.S. __, 113 S. Ct. 187 (1992), and Berry v. City of Muskogee, 900 F.2d 1489, 1499 (10th Cir. 1990) ("Although neither the City nor any of its employees or agents actually killed Mark Berry, based on the evidence presented in this trial, 'a jury reasonably could conclude that the City's conduct was the moving force in bringing about the constitutional violation'" (citation omitted)), with Tom v. Voida, 963 F.2d 952, 962 (7th Cir. 1992) ("because [defendant officer] did not violate Tom's constitutional rights, there is no basis

for liability against the other defendants either."), Williams v. Borough of West Chester, 891 F.2d 458, 467 (3d Cir. 1989) ("A municipality may be liable under section 1983 only if it can be shown that its employees violated a plaintiff's civil rights as a result of a municipal policy or practice. [Citation omitted.] West Chester cannot be vicariously liable under Monell unless one of West Chester's employees is primarily liable under section 1983 itself."), and Dodd v. City of Norwich, 827 F.2d 1, 8 (2d Cir. 1987) (opinion on reargument) (where an officer is negligent, but no constitutional violation occurred, the city cannot be held liable even if municipal policy itself "caused" Dodd's death), cert. denied, 484 U.S. 1007 (1988). Cf. Belcher v. Oliver, 898 F.2d 32, 36 (4th Cir. 1990) (where there is no underlying constitutional infraction, court need not reach the question of whether a municipal policy was responsible for the officers' actions); see also M. Schwartz & J. Kirklin, 1 Section 1983 Litigation: Claims, Defenses, And Fees (346) (2d ed. 1991) ("Heller, therefore, should not be read as announcing a broad rule requiring dismissal of the claim against the municipality in every case in which it is found that the defendant officer was not a constitutional violator.").

The instant case thus presents an appropriate occasion for this Court to resolve the issue, confused in circuit court case law, of whether individual liability is a prerequisite to municipal liability.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: December 8, 1992.

Sanford Jay Rosen
Counsel of Record

APPENDIX

United States Court of Appeals

For The Eighth Circuit

No. 89-2863WAF

Garner Gregory, Administrator of the Estate of Joe Edwin Gregory; Beate Gregory, individually and as mother and next friend of Joe Ray Gregory and Donna Mae Fields,	*	Appeal from the United States District Court for the Western District of Arkansas
v.	*	
The City of Rogers, Arkansas; Ptl. Ronnie Howell, individually and in his capacity as a police officer of the City of Rogers, Arkansas; and Imperial Casualty and Indemnity Co.,	*	
Appellees.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 9, 1992

United States Court of Appeals

For The Eighth Circuit

No. 89-2863WA

Garner Gregory, Administrator of the Estate of Joe Edwin Gregory; Beate Gregory, individually and as mother and next friend of Joe Ray Gregory and Donna Mae Fields,	*	Appeal from the United States District Court for the Western District of Arkansas
Appellants,	*	
v.	*	
The City of Rogers, Arkansas; Ptl. Ronnie Howell, individually and in his capacity as a police officer of the City of Rogers, Arkansas; and Imperial Casualty and Indemnity Co.,	*	
Appellees.	*	

Submitted: May 13, 1991

Filed: September 9, 1992

Before LAY,* Chief Judge, HEANEY, Senior Circuit Judge, McMILLIAN, ARNOLD,** JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, and LOKEN, Circuit Judges, en banc.

FAGG, Circuit Judge.

Garner Gregory, Beate Gregory, and Donna Mae Fields (the appellants) appeal the district court's order granting summary judgment to the City of Rogers, Arkansas, and Officer Ronnie Howell (the appellees) in this 42 U.S.C. § 1983 action. We affirm.

I.

We review the district court's grant of summary judgment de novo. Gumersell v. Director, Fed. Emergency Management Agency, 950 F.2d 550, 553 (8th Cir. 1991). Because this case comes to us on the appellees' motion for summary judgment, the appellants' evidence "[must] be believed, and all justifiable inferences [must] be drawn in [the appellants'] favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Viewed in this light, the record reveals the following series of events leading to this lawsuit.

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* The Honorable Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit when this case was submitted, took senior status on January 7, 1992.

** The Honorable Richard S. Arnold became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

One weekend night in late March 1986, Joe Edwin Gregory, Donna Mae Fields, and Stanley Turner decided to visit several nightclubs together. Turner drove the three of them in Gregory's car and served as Gregory and Fields's "designated driver" for the evening. (Am. Compl. ¶ 11; Fields Dep. at 21.) After the nightclubs closed, Turner started to drive Gregory and Fields home. Officer Howell, a Rogers policeman, stopped Turner for running a red light. Turner pulled into a local restaurant's parking lot and got out of the car. Fields, fearing she and Gregory would be arrested for public intoxication, told Gregory to be quiet to avoid drawing attention to themselves. (Fields Dep. at 7, 25.) Despite Fields's admonishment, Gregory got out of the car. Officer Marty Pollock, another Rogers policeman who was present, observed Gregory while he was outside the car. Gregory's behavior, however, did not reveal his intoxication. According to Officer Pollock, Gregory was neither belligerent nor argumentative, he got back in the car when Officer Pollock asked him to do so, and Officer Pollock "did not notice anything peculiar about him." (Pollock Dep. at 20-21.) Fields remained in the car and had no contact with either officer. Although Officer Howell walked up to the car, (Fields Dep. at 7), "[he] was not aware that the passengers in the [car] were intoxicated. They were not unruly. [He] observed no open containers [and] did [not] smell alcohol in the car or on their persons." (Howell Aff. ¶ 9.) Likewise, although Fields stated she had several helium filled balloons in the car, at which she and Gregory were batting "trying to keep them in the back" [of the car when] "they kept coming up over the back of the seat," (Fields Dep. at 37), Officer Pollock could not recall seeing the balloons or hearing any noise coming from the Gregory car, (Pollock Dep. at 20.)

Turner talked with Officer Howell while standing at the rear of Gregory's car. During this discussion, Turner

told Officer Howell that he, Gregory, and Fields were friends; that they had decided "to go out and party" to take Gregory's mind off his marital problems; and they had visited "some nightclubs." Turner also told Officer Howell that Gregory and Fields "had been drinking" and he was "driving them home." (Pollock Dep. at 19, 24.) Turner, however, did not tell Officer Howell that he was driving because Gregory and Fields were intoxicated. For his part, Turner was sober and fit to drive, and Gregory's appearance outside the car did nothing to suggest his condition was any different. Although Fields has little memory about the evening, she does not recall that "she did anything or took any action that would cause a police officer to arrest [her]." (Fields Dep. at 21.)

Officer Howell requested a routine warrant check on Turner, which revealed an outstanding warrant for Turner's arrest. Because the warrant was not of a serious nature, Officer Howell granted Turner's request that he be allowed to drive to the Rogers police station to clear up the outstanding warrant. Gregory and Fields remained with Turner. Turner drove to the police station and parked on a city street in front of the station. As soon as Turner stopped in front of the station, Officer Pollock drove away and resumed his duties elsewhere. Officer Howell parked his patrol car in the police station's parking lot behind the building. Turner left Gregory and Fields in the car and walked into the station where he met Officer Howell. (Howell Dep. at 23.) Howell did not ask Turner about Gregory and Fields, id., and Howell's deposition does not show Turner said anything about Gregory and Fields or expressed any concern about them waiting in the car. It is undisputed that Gregory and Fields were never under Officer Howell's control, taken into custody, or placed under arrest.

Approximately thirty minutes after Turner and Officer Howell met inside the station, "Gregory drove the car away from the police station." (Am. Compl. ¶ 17.) Unlike Turner, Gregory and Fields were quite intoxicated. Regrettably, Gregory and Fields were involved in a single car accident that killed Gregory and injured Fields. Tests later confirmed that Gregory and Fields each had blood-alcohol contents above the Arkansas legal limits for operating a motor vehicle. The record shows that after Gregory had driven off, but before the accident occurred, the police dispatcher sent out a radio bulletin alerting patrolling officers to be on the lookout for the Gregory car because "the driver was probably going to be intoxicated." (Pollock Dep. at 33.) The record does not reveal how the dispatcher obtained this information, but Officer Howell first learned Gregory and Fields had driven away after the accident had occurred. (Howell Dep. at 25.)

Fields, together with Gregory's wife, son, and estate, brought this section 1983 action contending Officer Howell and the City of Rogers violated Gregory's and Fields's Fourteenth Amendment substantive due process rights. According to the appellants, Officer Howell placed Gregory and Fields in danger by allowing them to remain in the car in front of the police station while waiting for Turner "in spite of their obviously intoxicated condition." (Am. Compl. ¶¶ 15-16.) The district court, however, concluded the appellants' claims sounded in negligence and, thus, were insufficient to state a claim under section 1983. Daniels v. Williams, 474 U.S. 327, 328 (1986) (holding a government official's negligent conduct will not support a substantive due process claim under section 1983); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986) (same). The district court granted the appellees' motion for summary judgment and dismissed the appellants' lawsuit. The appellants appeal from this dismissal.

II.

To prevail under section 1983, the appellants must show that persons acting under color of state law deprived Gregory and Fields "of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds, Daniels, 474 U.S. at 330-31. The parties do not dispute that Officer Howell and the City of Rogers acted under color of state law. Thus, our threshold inquiry is whether Officer Howell and the City of Rogers deprived Gregory and Fields of a substantive right arising under the Fourteenth Amendment. Baker v. McCollan, 443 U.S. 137, 140 (1979); Wells v. Walker, 852 F.2d 368, 370 (8th Cir. 1988), cert. denied, 489 U.S. 1012 (1989).

The Fourteenth Amendment Due Process Clause, like its Fifth Amendment counterpart, protects persons against abusive, arbitrary, or oppressive government conduct. See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989); Daniels, 474 U.S. at 331; Davidson, 474 U.S. at 348. Many harms, though caused by a state actor, do not fall within the scope of section 1983, for section 1983 does not turn the Fourteenth Amendment into a font of tort law that supersedes the tort systems already available under individual state laws. See Estelle v. Gamble, 429 U.S. 97, 107 (1976); Paul v. Davis, 424 U.S. 693, 701 (1976). Indeed, "the [F]ourteenth [A]mendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property." Abernathy v. Perry, 869 F.2d 1146, 1148 (8th Cir. 1989) (citing Daniels, 474 U.S. at 328; Davidson, 474 U.S. at 347). Thus, to survive a motion for summary judgment, the appellants must show the summary judgment record supports their claim that the

appellees' conduct rose to the level of a constitutional tort for which section 1983 provides a remedy.

The appellants contend Officer Howell violated Gregory's and Fields's substantive due process rights by failing to provide for their safety after he detained their designated driver. We disagree. In DeShaney, the Supreme Court explained that "nothing in the language of the Due Process Clause . . . requires the [s]tate to protect the life, liberty, and property of its citizens against invasion by private actors." DeShaney, 489 U.S. at 195. Although the Due Process Clause "forbids the [s]tate itself to deprive individuals of life, liberty, or property without 'due process of law,' . . . its language cannot fairly be extended to impose an affirmative obligation on the [s]tate to ensure that those interests do not come to harm through other means." Id. Only in limited circumstances does the Constitution impose on the state an affirmative duty to protect or care for particular individuals, id. at 198, and those circumstances are not present in this case.

We have held the Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced. Wells, 852 F.2d at 370; see also Deshaney, 489 U.S. at 195, 199-200; Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990). The appellants do not contend that Officer Howell took Gregory and Fields into custody, exercised control over them, or had any special relationship with them. (Appellants' Br. at 23-24; Appellants' Reply Br. at 5, 9.) Nor do the appellants challenge Turner's arrest or the legitimacy of his detention, even though it disrupted Gregory and Fields's trip home,

or suggest that Office Howell was obligated to assumes Turner's role as Gregory and Fields's designated driver and drive them home. Rather, the appellants contend that by allowing Gregory and Fields to remain unattended in Gregory's car, Officer Howell "actively placed [them] in a situation of undeniable and certain danger" they would not otherwise have encountered. (Appellants' Br. at 22-23; Am. Compl. ¶ 24.)

To establish their claim that Gregory and Fields had a substantive due process right to Officer Howell's protective services, the appellants make two distinct contentions in their complaint. See Collins v. City of Harker Heights, 112 S.Ct. 1061, 1068 (1992) (court must look to the complaint for a description of the constitutional right at stake). First, the appellants contend that Officer Howell "knew or should have known" Gregory and Fields were vulnerable because of their intoxication and, thus, could not drive safely. (Am. Compl. ¶¶ 11, 14.) Second, the appellants contend that it was dangerous for Gregory and Fields to remain unattended in Gregory's car while Turner was in the police station. (Am. Compl. ¶¶ 15-16, 24.)

To withstand the appellees' motion for summary judgment, the appellants had the burden of presenting evidence sufficiently supporting the disputed material facts that a reasonable jury could return a verdict in their favor. Anderson, 477 U.S. at 248. The object of our review, then, is to determine whether the appellants submitted "sufficient probative evidence [that] would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy." Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985). A mere scintilla of evidence is insufficient to avoid summary judgment. Anderson, 477 U.S. at 252. If the evidence the appellants put forward "is

merely colorable," or "is not significantly probative," the appellees are entitled to summary judgment as a matter of law. Id. at 249-50. With these principles in mind, we consider the appellants' contentions in turn.

Having considered the evidence supporting the appellants' first contention, we conclude a reasonable trier of fact could not find Officer Howell "knew or should have known" Gregory and Fields were intoxicated and unfit to drive. During the sixteen minutes it took to stop Turner and discover the outstanding arrest warrant, nothing happened to alert Officer Howell or Officer Pollock to Gregory and Fields's intoxicated condition. While standing at the rear of Gregory's car, Turner briefly "explained to Officer Howell that he was . . . driving [Gregory and Fields] home. He said that they had been drinking and they were all friends and that because Gregory had been having some marital problems . . . they all decided to go out and party." (Pollock Dep. at 24.) Turner also mentioned they had "attend[ed] some night clubs in the area." (Pollock Dep. at 19.) (The record contains no deposition or affidavit from Turner.) Although Turner probably knew of their intoxication, he did not tell Office: Howell that Gregory and Fields needed a designated driver because they were intoxicated. Nor did Turner disclose what Gregory and Fields had been drinking, how much they had consumed, or when they took their last drink.

As given, Turner's statements add up to nothing more than an explanation that the trio had gone out for an evening of entertainment and diversion, and Gregory and Fields had likely consumed alcohol. Turner's words fall short of giving Office Howell grounds to believe Gregory and Fields were intoxicated. Indeed, from Officer Howell's perspective, the happenings surrounding the traffic stop presented nothing out of the ordinary--Turner

was sober; the owner of the car, Gregory, appeared sober and coherent when he stepped outside the car; Gregory and Fields were not unruly and their conduct, if observed, was limited to keeping the floating balloons in the back of the car; Officer Howell noticed no odor of alcohol or beverage containers in view; and nothing Turner said suggested Gregory and Fields had consumed enough alcohol to reach the point of intoxication.

Given the absence of any detectable signs that Gregory and Fields were intoxicated, Turner's statement that they had been drinking does not provide a sufficient basis on which a jury could reasonably draw the inference that Officer Howell was aware of their intoxication and unfitness to drive. See Mercer v. Armontrout, 864 F.2d 1429, 1436 (8th Cir. 1989) (evidence that person has consumed alcohol does not establish intoxication); Miles v. Ryan, 484 F.2d 1255, 1258 n.6 (3d Cir. 1973) (same); Pendergrast v. United States, 416 F.2d 776, 778 n.1, 785 n.51 (D.C. Cir.) (evidence that two persons had consumed a pint of whisky and two beers does not imply they were intoxicated), cert. denied, 395 U.S. 926 (1969). An inference is a logical deduction reasonably drawn from facts established by evidence in the record. See Mitchell v. Machinery Ctr., Inc., 297 F.2d 883, 885 (10th Cir. 1961). The appellants' evidence, on the other hand, would allow the jury to draw nothing more than a mere supposition--a possibility or guess that a condition existed without a scintilla of proof that it did. See id. Based on the information available to Officer Howell, Gregory and Fields were nothing more than adult passengers, undoubtedly inconvenienced by Turner's arrest, who were at liberty to make their own arrangements if they did not want to wait for Turner. The appellants have thus failed to submit sufficient evidence to support the first contention on which they base their section 1983 claim.

Having failed to submit sufficient evidence to withstand summary judgment on their first essential contention, the appellants cannot prevail. Nevertheless, we also conclude that even if Officer Howell knew Gregory and Fields were intoxicated, a reasonable trier of fact could not find that Officer Howell affirmatively placed Gregory and Fields in danger when "Gregory and Fields were left in the car" at the police station. (Am. Compl. ¶ 15.) Officer Howell did not leave Gregory and Fields stranded at the place of Turner's arrest or in a dangerous area. See Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), cert. denied, 111 S. Ct. 341 (1990) (trooper knowingly left arrested driver's female passenger stranded in a high-crime area during inclement weather); White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (police officers stranded young children on Chicago expressway during inclement weather). Nor did Officer Howell interfere with Gregory and Fields's decision to remain in the car with Turner--the person they had selected to serve as their "designated driver" and whom they characterize as their "caretaker." (Appellant's Br. at 22.) Instead, Officer Howell permitted Turner to drive the car to the police station, where Turner chose to park on a city street in front of the station.

In carrying out Turner's arrest in this manner, Officer Howell gave Turner a free hand to make suitable arrangements for his passengers before he joined Officer Howell in the police station. Although Turner's arrest delayed him from immediately driving Gregory and Fields home, Turner was clearly in a position to perform his caretaker role. After all, Turner was alone in the car with Gregory and Fields in front of a police station, he was under no pressure to rush into the station, he knew Gregory and Fields had not been taken into custody, and of all people, he knew the true extent of their drinking. If Gregory and Fields were too intoxicated to care for

themselves or be left alone, Turner could have brought them inside the police station, made phone calls to other friends to take Gregory and Fields home (Turner was seated inside the police station; he was not placed in a cell), or informed Officer Howell that Gregory and Fields could not safely be left unsupervised. The record does not show that Turner took any of these actions; instead, he placed Gregory and Fields in danger when he failed to remove the keys from the car before he entered the police station. (Nothing in the complaint or record suggests Gregory had a second set of keys.) Tragically, all Turner had to do to protect Gregory and Fields from harm was retain those keys, which would have ensured Gregory could not drive away while intoxicated. Simply put, it was not unsafe for the intoxicated Gregory and Fields to wait for Turner inside the car where it was parked until Turner inexplicably left the keys with them. Certainly, Officer Howell could not foresee Turner abdicating his responsibility as their designated driver, and it was his abdication that placed Gregory and Fields in danger, not Officer Howell's performance of his official duty.

Nevertheless, the appellants assert that Officer Howell should have "taken [Gregory and Fields] inside the police station" and should have "remov[ed] the keys from the [car]." (Am. Compl. ¶¶ 15, 16.) These assertions amount to nothing more than a transparent effort to circumvent the general rule that Gregory and Fields had "no constitutional right to be protected by [Officer Howell] against harm inflicted by [Turner]." Wells, 852 F.2d at 370; Deshaney, 489 U.S. at 195-96. Truly, the appellants' case is bottomed on the flawed premise that Officer Howell endangered Gregory and Fields by leaving them in the company of their own designated driver.

Given the record in this case, a reasonable trier of fact could not conclude that Officer Howell "affirmatively place[d] [Gregory and Fields] in a position of danger." Wells, 852 F.2d at 370. Instead, the appellants have failed to present a triable issue on their claim that Gregory and Fields "possessed a right arising under the [F]ourteenth [A]mendment to be protected by [Officer Howell] from harm inflicted by a third party." Id. There being no deprivation of a protected right, we need not consider whether the district court properly characterized the appellants' complaint as stating nothing more than a mere negligence claim, see Baker, 443 U.S. at 140 & n.1; see also Daniels, 474 U.S. at 328, or what greater standard of care is necessary to state a substantive due process claim under section 1983, see Myers v. Morris, 810 F.2d 1437, 1468-69 (8th Cir. 1987) (holding gross negligence does not implicate the due process clause).

III.

The appellants base their claim against the City of Rogers on theories that Officer Howell's conduct resulted from inadequate training and from following municipal policy or custom. Having concluded Officer Howell did not violate Fields's and Gregory's constitutional rights, the appellants cannot press a claim against the City of Rogers on either theory. Reynolds v. City of Little Rock, 893 F.2d 1004, 1007 (8th Cir. 1990) (quoting City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam)); see also Tempkin v. Frederick County Comm'rs, 945 F.2d 716, 724 (4th Cir. 1991).

We affirm the district court.

HEANEY, Senior Circuit Judge, dissenting, with whom LAY, Chief Judge, and MCMILLIAN, ARNOLD and JOHN R. GIBSON, Circuit Judges, join.

I agree with much of the court's opinion.[1] The court implicitly recognizes, and I agree, that if the plaintiffs' allegations are true, officer Howell is liable to the plaintiffs under section 1983. The allegations present a picture of active government intervention that placed the plaintiffs in greater danger and rendered them more vulnerable than they would have been otherwise, thus distinguishing this case from DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989). I believe, however, that the record when viewed in the light most favorable to the plaintiffs contains sufficient evidence to withstand summary judgment. The plaintiffs offered evidence: (1) that the officers for the City of Rogers knew that Garner Gregory and Donna Mae Fields were drunk when they stopped and detained Stanley Turner, the plaintiffs' designated driver, and (2) that in light of this knowledge, the officers were reckless when they failed to prevent these intoxicated people from driving away from the police station. According, I dissent.

I.

Although the court sets forth the correct legal standards for evaluating the evidence presented below, it has neither viewed that evidence in the light most favorable

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[1] A complete statement of the relevant facts and claims of the parties is set forth in the opinion of the three-judge panel that initially heard this appeal on October 9, 1990. Gregory v. City of Rogers, Arkansas, 921 F.2d 750, 751-53 (8th Cir. 1990).

to the plaintiffs nor drawn all justifiable inferences in the plaintiffs' favor.[2] I turn first to the court's conclusion that "during the sixteen minutes it took to stop Turner and discover the outstanding arrest warrant, nothing happened to alert Officer Howell or Officer Pollock to Gregory's and Fields's intoxicated condition." See ante at 8. The following evidence, viewed in light most favorable to the plaintiffs, demonstrates that the court has erred by concluding that no reasonable fact finder could find that the officers knew or recklessly disregarded the fact that Garner Gregory and Donna Mae Fields were intoxicated on the night in question.

1. Turner, the plaintiffs' designated driver, told Howell, the arresting officer,[3] that his passengers "had been drinking," had visited "some nightclubs," had decided "to go out and party," and that he was driving them home. Ante at 3. Turner also explained that Gregory was going out to party because Gregory was having problems with his wife. Id. It is of little importance that Turner did not directly tell the officers "that he [Turner] was driving because Gregory and Fields were intoxicated." Ante at 3. Given the ordinary usage of words like "party," the now-common custom of having a sober designated driver before

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[2] For example, the court states as fact that "Gregory's behavior [during the traffic stop] . . . did not reveal his intoxication." See ante at 2. Although this "fact" is a reasonable inference if one views the officers' testimony in a light favorable to them, it is not the only reasonable inference to be drawn from the evidence. See infra at 14.

[3] As backup officer, Pollock also was able to hear the conversation between Turner and Howell. Pollock Dep. at 19, 24.

visiting a string of nightclubs and bars, and the age-old practice of drinking heavily to drown ones' troubles, a reasonable trier of fact easily could conclude that Turner's "designated driver" status was obvious to the officers.[4]

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[4] Although the court acknowledges that Turner told Howell and Pollock that the plaintiffs had been drinking, it cites a number of cases to show that such a statement would not provide a jury with enough evidence to conclude that the officers were aware of their intoxication and unfitness to drive. See ante at 8-9. With all due respect, I read these cases differently, and I doubt their applicability here. For example, in Mercer v. Armontrout, 864 F.2d 1429, 1436 (8th Cir. 1988), the question was whether counsel was ineffective for failing to highlight the defendant's diminished capacity and failing to elicit evidence about the defendant's consumption of alcohol before he committed a murder. We did not rule that such evidence could never support a finding of intoxication. In Prendergast v. United States, 416 F.2d 776, 778 n.1, 781 n.51 (D.C. Cir.), cert. denied, 395 U.S. 926 (1969), the question was whether the police had probable cause to arrest someone when the complainant upon which they relied had consumed some alcohol. The District of Columbia Circuit never said that evidence of alcohol consumption could not support a finding of intoxication. Finally, Miles v. Ryan, 484 F.2d 1255, 1258 n.6 (3d Cir. 1973), only dealt with the admissibility of witness evidence under Pennsylvania law, with a dissent vigorously contesting the court's conclusions.

Moreover, as I demonstrate below, there was more in this case than mere words. Turner was driving Gregory's car; this, coupled with what Turner said to the officers, made it clear that he was the plaintiffs' designated driver. In addition, Gregory was loud and

2. The plaintiffs' actions during the stop only added to the evidence that Turner was the "designated driver." Fields and Gregory were batting around four or five helium-filled balloons in the car while the police questioned Turner only a few feet away. Fields Dep. at 37; Pollock Dep. at 19. Gregory was making a lot of noise in the car; enough that Fields was concerned they might be arrested. Fields Dep. at 25, 37-28. A reasonable trier of fact could conclude that the officers could see and hear these goings on; the parking lot was well lit, the headlights of Pollock's police car were shining into the car, and Howell and Pollock stood no more than three of four feet behind the car. Fields Dep. at 37-38; Pollock Dep. at 20; Howell Dep. at 16. A trier of fact could reasonably conclude that sober people would not have behaved as Fields and Gregory did in the presence of police officers.

3. A reasonable trier of fact could find that Officer Howell knew that Turner was the plaintiffs' designated driver because Gregory owned the car that Turner was driving. Howell and Pollock spent sixteen minutes with Turner in the parking lot after the stop. Officer Howell asked Turner for his driver's license. The dispatcher than ran a warrant check on turner's license, a procedure that ordinarily takes three minutes, leaving thirteen minutes for other matters. Howell Dep. at 16-20. The warrant check revealed that there was a traffic warrant out for Turner. Howell did not recall running the license plate of the car to see if it was stolen, but "if the dispatcher is not busy . . . they will automatically do it for you." Howell Dep. at 17. The license plate check, of course, would have shown that Gregory, and not Turner, owned

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both Gregory and Fields were acting drunk by batting around the balloons in the car while officers were only a few feet away.

the car Turner was driving. It is difficult to believe that Howell did not learn during the stop that Gregory owned the car.

4. The court's opinion downplays perhaps the most significant fact in this case. Shortly after the police took Turner into custody at the police station, the dispatcher alerted police officers over the radio that the Turner car "had driven off from the station and that the driver was probably going to be intoxicated." Pollock Dep. at 33 (emphasis added). Both Turner and Officer Howell were in the police station at that time. Howell Dep. at 23-24. The record does not reveal who told the dispatcher (1) that the Gregory vehicle had been driven off, and (2) that the driver was intoxicated. A reasonable trier of fact could conclude that Howell went outside to the area where the Turner car had been parked, saw it was gone, and reported the facts to the dispatcher, who then alerted to other police officers. After all, Howell was freer to leave the police station than Turner, who was in custody, and Howell would have known that the passengers were drunk.[5] Although Officer Howell claimed he did not learn about the plaintiffs' "escape" from the police station until after the accident, see Howell Dep. at 25, we cannot assume that claim to be true on a motion for summary judgment.

II.

A reasonable factfinder could conclude that Howell and Pollock knew: (1) that the plaintiffs were intoxicated, (2) that Turner had been their designated driver, and (3)

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[5] Other inferences could be drawn in the defendant's favor from the evidence, but that is not out task on summary judgment.

that Turner had been driving Gregory's car. It naturally follows that a reasonable factfinder could conclude that Officers Howell and Pollock deliberately led Gregory and Fields to their own devices in Gregory's car, recklessly disregarding the grave risk that they would injure themselves as a result of driving while intoxicated. It was foreseeable that Gregory had the keys to his own car, and police officers have a heightened awareness of the dangers of an intoxicated driver. Nothing in the record, however, indicates that Howell or Pollock took any steps to ensure that Fields or Gregory would not drive away from the police station. In fact, after Turner was escorted to the police station, Officer Howell testified that Gregory and Fields were "free to go" if they wanted. Howell Dep. at 25. Under these circumstances, the plaintiffs alleged sufficient facts to withstand summary judgment.

III.

This case does not present facts as compelling as those in Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989); or White v. Rochford, 592 F.2d 381 (7th Cir. 1979). Drunken people are far less sympathetic plaintiffs than crime victims or young children, and the plaintiffs here may well have difficulty obtaining a favorable jury verdict. Moreover, the record here is not as well developed as it could be. We do not have the depositions of two key players, Turner and the police dispatcher. Nonetheless, based on the record before us, the plaintiffs have set forth sufficient facts to preclude summary judgment. Accordingly, I dissent.

United States Court of Appeals
For the Eighth Circuit

No. 89-2863WA

GARNER GREGORY, ADMINISTRATOR OF THE ESTATE OF JOE EDWIN GREGORY; BEATE GREGORY, individually and as mother and next friend of JOE RAY GREGORY; and DONNA MAE FIELDS Appellants, v. THE CITY OF ROGERS, ARKANSAS; PTL. RONNIE HOWELL, individually and in his capacity as a police officer of the City of Rogers, Arkansas; and IMPERIAL CASUALTY AND INDEMNITY CO., Appellees.	*	Appeal from the United States District Court for the Western District of Arkansas

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Argued: October 9, 1990
Filed: December 12, 1990

Before LAY, Chief Judge, HEANEY, and TIMBERS,* Circuit Judges.

TIMBERS, Circuit Judge:

Appellants Garner Gregory, Beate Gregory and Donna Mae Fields (the Gregory Estate and Fields) appeal from an order, entered October 30, 1989, based on an oral ruling from the bench, in the Western District of Arkansas, H. Franklin Waters, District Judge, granting appellees' motion for summary judgment and dismissing the action. The Gregory Estate and Fields commenced the action pursuant to 42 U.S.C. § 1983 (1988) after Joe Edwin Gregory (Gregory) was killed and Fields was injured in an automobile accident. The Gregory Estate and Fields contend that Fields and Gregory were deprived of their substantive due process rights when police officers, after arresting the sober driver of Gregory's vehicle, failed to detain or otherwise safeguard Gregory and Fields, who were intoxicated. In its order dismissing the action, the court ruled "sua sponte" that the court lacked subject matter jurisdiction, having previously stated from the bench that the action sounded in negligence and did not state a constitutional violation. No written opinion was filed.

On appeal, appellants contend that the summary judgment/dismissal was improper. They argue that it is a violation of an intoxicated individual's fourteenth amendment right to substantive due process for a police officer to remove the individual's "designated driver" without taking precautions for the individual's safety or

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* Of the Second Circuit, sitting by designation.

arresting the individual, contrary to the command of a statute that imposed a duty to arrest the intoxicated individual. For the reasons set forth below, we reverse and remand for further proceedings.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal. We review the district court's conclusions of law de novo, since summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

During the early morning hours of Sunday, March 30, 1986, Stanley Turner was driving the vehicle of his friend Gregory. Gregory and Fields were passengers in the vehicle. Gregory and Fields were intoxicated, having been drinking since approximately 7:30 p.m. the night before. Turner was sober and apparently was the group's "designated driver." At approximately 2:30 a.m., a police officer employed by the City of Rogers, Arkansas, appellee Ronnie Howell (Officer Howell), stopped the vehicle for running a red light. A second officer, Marty Pollock (Officer Pollock) arrived at the scene approximately one minute later to provide "back-up" assistance.

Officer Howell ordered Turner to get out of the car. A warrant check on Turner revealed an outstanding warrant for his arrest.

Although there is no evidence that Officer Howell initiated an investigation of the identity or condition of the passengers in the car, there is evidence that he did know of their intoxicated condition. That is, according to Officer

Pollock, Turner told Officer Howell that he was driving the two passengers home; that the three had been attending some night clubs and had decided to go out and "party"; and that Gregory and Fields had been drinking.

Officer Howell took Turner into custody, instructing him to drive the car and follow him to the Rogers police station to clear up the matter of the warrant. At 2:51 a.m., Officer Howell arrived at the police station. Ultimately, Turner was detained and held for transport to another police department. Gregory and Fields were left in the car when Turner arrived at the police station. Officer Pollock, who had followed Turner to the police station, watched Turner park at the station and then resumed his duties elsewhere in the city.

Shortly thereafter, Officer Pollock received information over the radio from the dispatcher to be on the lookout for "this vehicle that had driven off from the station and that the driver was probably going to be intoxicated." In Officer Pollock's words, "not much longer after that, not very long at all, we received the call from the accident at Highway 62 and 102, an injury accident."

At approximately 3:23 a.m., the car, now being driven by Gregory, went off the road while going north bound on U.S. Highway 62, became airborne, and eventually landed 275 feet from the highway. Gregory died within the hour, leaving a wife and infant son. Fields sustained extensive injuries. Gregory's post-mortem blood alcohol content was .23%, more than twice the legal limit of .10%. Fields' blood alcohol content, measured two hours later, was .17%.

The case was scheduled for trial on October 20, 1989. A jury had been enpanelled and was waiting.

Instead of going forward with the trial, the court granted the summary judgment motion as stated above. The court relied principally on the recent Supreme Court decision, DeShaney v. Winnebago County Department of Social Services., 489 U.S. 189 (1989), which held that a state has no constitutional duty to protect the public from themselves. Although the court characterized its dismissal of the instant action as one for lack of subject matter jurisdiction, it might more accurately be construed as an entry of summary judgment, since the court concluded that the undisputed facts did not support a finding of anything other than negligence.

II.

Section 1983 imposes liability upon "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983 (1988). The Supreme Court has made clear that the first inquiry in any § 1983 action "is whether the plaintiff has been deprived of a right 'secured by the Constitution and law.'" Baker v. McCollan, 443 U.S. 137, 140 (1979).

In the instant case, the Gregory Estate and Fields claim a violation of rights arising under the fourteenth amendment, which provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. In analyzing appellants' substantive due process claim, "our task is two-fold." Wells v. Walker, 852 F.2d 368, 369 (8th Cir. 1988), cert. denied, 109 S. Ct. 1121 (1989). First, we consider whether Gregory and Fields "possessed a right

arising under the fourteenth amendment . . . ." Id. at 370. Second, we determine "whether [appellees'] conduct deprived [them] of [that right] within the meaning of the due process clause." Id.

Chief among the "liberty" interests protected by the due process clause "is the right to some degree of bodily integrity." White v. Rochford, 592 F.2d 381, 383 (7th Cir. 1979). Accordingly, the due process clause is implicated, for example, where a police officer uses excessive force in the apprehension of a subject. Id.

Critical to our decision in the instant case is DeShaney v. Winnebago County Department of Social Services., 489 U.S. 189 (1989). There the Supreme Court held that the state's failure to protect against private violence did not constitute a deprivation of liberty in violation of the due process clause. 489 U.S. at 191. The facts of that case, as the Court acknowledged, were "undeniably tragic." Id. Joshua DeShaney, a four-year-old infant, had been in the custody of his father, Randy DeShaney, since 1980. In January 1982, the Winnebago County authorities first learned that Joshua might be the victim of child abuse, when the father's second wife complained to the police about his hitting Joshua. The Winnebago County Department of Social Services (DSS) interviewed Randy DeShaney but did not pursue the charges any further. In January and February of 1983, Joshua was admitted to the hospital with injuries that were the result of suspected child abuse. A DSS caseworker made monthly visits to the DeShaney home, during which time she observed numerous suspicious injuries to Joshua's head. The caseworker recorded these incidents in her file, along with her suspicions that someone in the DeShaney household was abusing Joshua physically, but she did nothing more. In November 1983, the emergency room

notified DSS again that Joshua had been treated for suspicious injuries. On the caseworker's next two visits to the DeShaneys', she was told that Joshua was too ill to see her. In March 1984, Randy DeShaney beat Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Though still alive, Joshua has suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. His father was subsequently tried and convicted of child abuse.

In their § 1983 action, Joshua and his mother urged that a "special relationship" existed between Joshua and the state by virtue of the latter's knowledge of the risk of abuse and its stated intention to protect Joshua, even though they conceded that the state had played no role in creating the danger that Joshua faced. Id. at 197. The Court, however, in reviewing cases in which it previously had found a due process violation, stated that they "afford petitioners no help", because they stand only for the proposition that the state has an affirmative duty to provide for the safety and well-being of those individuals, such as prisoners or mental hospital inmates, whom it takes into its custody and hold against their will. Id. at 199-200. The Court stated: "[i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." Id. at 200.

The Court also stated that "nothing in the language of the Due Process Clause itself requires that State to protect the life, liberty, and property of its citizens against invasion by private actors." Id. at 195 (emphasis added).

Significantly, the Court further stated that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." Id. at 201. Under those circumstances, the Court held that the state had no constitutional duty to protect Joshua. Id.

III.

With the foregoing in mind, we turn now to the question whether appellants have implicated a constitutional violation.

(A)

We first consider whether, in the wake of DeShaney, Gregory and Fields, if permitted to do so, can establish a right arising under the fourteenth amendment to be protected from harm. Wells v. Walker, supra, 852 F.2d 368. According to the district court's analysis here, the fact that the intoxicated individuals were not physically restrained is dispositive of their constitutional claim. We disagree. We believe that this case is sharply distinguishable from DeShaney in one very significant respect.

In this case, unlike in DeShaney, the state did do something to create a danger for Gregory and Fields and render them more vulnerable, i.e., a police officer took their designated driver from them. Gregory and Fields had taken the precaution of appointing a designated driver; by removing that driver, the state exposed the two passengers to grave danger, as the result of which one was killed and the other was seriously injured.

In Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990), we explained that DeShaney left unclear "how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect." However, relying on DeShaney, we noted that "at some point such actions do create such a duty." Id. (emphasis added). In that case, we were faced with a situation in which appellant had alleged that her decedents met their violent and untimely death at the hands of her estranged husband, Norman "Bud" Downen, at a time when Downen was subject to a restraining order which appellees allegedly did not enforce. Id. at 53-54. The district court in that case, like the district court in the instant case, dismissed the complaint relying on DeShaney. See id. at 54.

At oral argument, appellant in Freeman alleged that Bud Downen had been a "close bosom buddy of the Police Chief," such that appellant "probably would be able to show that on occasions that [sic] some officers attempted to stop the conduct of Mr. Downen by they were directed not to . . . ." Id. at 54. We found that "such an allegation is distinguishable from DeShaney," because:

> "[i]t presents a claim that the violence the decedents were subjected to was not solely the result of private action, but that it was also the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community-with such interference increasing the vulnerability of decedents to the actions of 'Bud' Downen and possibly ratifying or condoning such violent actions on his part."

Id. at 54. We held that appellant had raised the possibility that she could make out a constitutional claim, and we reversed the district court's dismissal order with directions that appellant be permitted to amend her complaint. Id. at 55.

In another post-DeShaney decision, the Ninth Circuit, in a case with facts similar to those in the instant case, held that appellant had presented genuine issues of material fact on the question whether a state trooper had deprived her of a liberty interest. Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), cert. denied, 59 U.S.L.W. 3325 (1990). In that case, Trooper Ostrander pulled a car over, arrested the driver and impounded the car, and left the passenger, appellant Wood, near a military reservation in a high-crime area. Id. at 586. Appellant alleged that, after walking half a block toward her home, which was five miles away, and having turned down rides offered by three or four strangers, she accepted a ride with an unknown man who took her to a secluded area and raped her. Id.

Distinguishing the situation in DeShaney where the state "'played no part' in creating the dangers," id. at 590, the Ninth Circuit held in Wood that appellant had "raised a triable issue of fact as to whether Ostrander's conduct "'affirmatively placed the plaintiff in a position of danger.'" Id. at 589-90 (citation omitted). The court held that "[t]he fact that Ostrander arrested [the driver], impounded his car, and apparently stranded Wood in a high-crime area at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety." Id at 590. The court held that Wood had raised a triable issue regarding Ostrander's knowledge of the danger.

The Eleventh Circuit, in Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989), cert. denied, 110 S. Ct. 1784 (1990), also held that a right to be protected from harm could arise from state action exposing an individual to danger. Id. at 355. In that case, appellant was abducted by prison inmates working in a community work squad under the supervision of the state. Id. at 349-50. Distinguishing that case from DeShaney, the court stated that "[i]n this case, the defendants did indeed create the dangerous situation of the inmates' presence in the community by establishing the work squad and assigning the inmates to work around the town hall." Id. at 356. See also Ross v. United States, 910 F.2d 1422, 1431 (7th Cir. 1990) (case distinguishable from DeShaney where county policy cut off private sources of rescue without providing "meaningful alternative").

In Wood, supra, the court explicitly relied on a pre-DeShaney case, White v. Rochford, supra. In White, 592 F.2d at 382, the court held that police officers could not, with "constitutional impunity," abandon children and leave them in health-endangering situations after having arrested their custodian. The childrens' uncle was arrested for drag-racing on a busy Chicago highway; the officers left the children abandoned in the car on the side of the highway in the cold, the uncle's pleas for their aid notwithstanding. Id. The court held that the officers' refusal to lend aid to children "endangered by the performance of official duty" violated the due process clause. Id. at 383. The statement by Judge Tone has particular relevance here:

> "In the case at bar the children in the car had a federally protected right to be free from unjustified intrusions on their personal security by the police. Their personal security was under the protection of

> their uncle. If that protection was removed and no alternative protection was provided, they would be exposed to danger as occupants of an immobilized car on a highspeed expressway. Arresting their uncle and thus removing their protection, and yet leaving the children exposed to these hazards, was an unjustifiable intrusion on the children's personal security."

Id. at 387 (Tone, J., concurring) (emphasis added).

In Wells, supra, we followed a line of cases holding that a constitutional deprivation can arise from private violence when the state affirmatively places a particular individual in a position of danger in which the individual would not otherwise have been. 852 F.2d at 370-71. Under that analysis, we held that the decedent had a right to be protected from harm inflicted by a released criminal, id. at 371, who had been released for transportation at the decedent's store, which also served as a bus station, without a warning to decent that the released criminal was dangerous. Id. at 369.

Although White and Wells were decided prior to the Supreme Court's decision in DeShaney, the holding in Freeman, Wood, and Cornelius, supra, convince us that a case like the instant one is still viable under § 1983, even in the wake of DeShaney. In the instant case, Officer Howell created the dangerous situation.

(B)

We turn next to the question whether Fields and the Gregory Estate have adequately alleged that Officer Howell's conduct deprived Fields and Gregory of their right to protection within the meaning of the due process

clause. That inquiry requires consideration of the level of conduct with which the officer is charged.

If appellees' alleged conduct, as a matter of law, were merely negligent, appellants would have no constitutional claim. Daniels v. Williams, 474 U.S. 327, 328 (1986) ("the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.") (affirming summary judgment in § 1983 case in which a prison inmate alleged that he slipped on a pillow negligently left on a staircase by a correctional deputy). In Wells, supra, although we held that the decedent had a protectible right under the fourteenth amendment, we held further that the defendants had not deprived her of that right by simply failing properly to screen the criminal and thus discover his propensity for violence--conduct which amounted to mere negligence. 852 F.2d at 371.

It also is clear that "an intentional deprivation of life, liberty and property interests by a state actor does state a cause of action under § 1983, and that 'intentional' actions include such culpable mental states as callous indifference." Britt v. Little Rock Police Dep't, 721 F. Supp. 189, 192 (E.D. Ark. 1989) (emphasis added).

The parameters of § 1983 liability become fuzzier, however, when the conduct of a state actor falls into an intermediate category, such as gross negligence or recklessness. Daniels, supra, 474 U.S. at 334 n.3 ("this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause"); Wells, supra, 852 F.2d at 371 ("We are mindful that the Supreme Court in Daniels left open the possibility that 'something less than intentional conduct,

such as recklessness or gross negligence,' is enough to trigger the protections of the [d]ue [p]rocess [c]lause' for purposes of a 42 U.S.C. § 1983 action. We are not required to explore that issue here because we conclude the descriptions of defendants' conduct in the complaint belie their characterization as anything other than ordinary negligence . . . .") (citations omitted) (brackets added in Wells).

Previously, we have held that grossly negligent conduct, like merely negligent conduct, "does not state a claim under 42 U.S.C. § 1983." Myers v. Morris, 810 F.2d 1437, 1468-9 (8th Cir. 1987); see also Tallman v. Reagan, 846 F.2d 494, 495 (8th Cir. 1988) ("Tallman's complaint alleged at the most gross negligence on the part of appellees, which does not implicate the due process clause.") (affirming order of dismissal). As the Seventh Circuit has persuasively put it:

> "Gross negligence blends into negligence; there is an indistinct and unusually invisible line between benefits exceeding the cost of precautions (negligence) and benefits substantially exceeding the costs (gross negligence). The malleable quality of these terms has produced scoffing among many, who see gross negligence as simply negligence 'with the addition of a vituperative epithet' . . . .
>
> . . . The distinction between negligence and gross negligence does not respond to the Due Process Clause."

Archie v. City of Racine, 847 F.2d 1211, 1219-20 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1338 (1989); see also Britt, supra, 721 F. Supp. at 189 (stating that if the question whether gross negligence could make out a

§ 1983 claim were open in this circuit, it would follow the reasoning in the Archie case).

As to recklessness, however, we agree with those courts that have held that this level of conduct is sufficient to make out a claim under § 1983. As the district court in Britt stated:

> "Cases after Daniels . . . have generally agreed that recklessness, which may be defined as 'intentionally doing an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow,' Prosser & Keeton, Torts, at 212, is sufficiently like intent that due process is implicated."

721 F. Supp. at 192; see also Archie, supra, 846 F.2d at 1220 ("'Recklessness' is a proxy for intent").

In the instant case, the Gregory Estate and Fields have raised questions of fact as to whether or not Officer Howell's conduct was reckless. For example, according to the deposition testimony of Officer Pollock, Officer Howell was informed by Turner that Gregory and Fields were intoxicated, and yet Howell detained Turner without making any provision for Gregory and Fields. Shortly after Turner was detained, Officer Pollock received information over the radio from the dispatcher to be on the lookout for "this vehicle that had driven off from the station and that the driver was probably going to be intoxicated." (emphasis added). Based on this evidence, a jury could conclude that Officer Howell deliberately left Gregory and Fields to their own devices in the Gregory vehicle, disregarding a grave risk that they would injure themselves as a result of driving while intoxicated.

Summary judgment was inappropriate under such circumstances. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (summary judgment is inappropriate where "a reasonable jury could return a verdict for the nonmoving party."); Cornelius, supra, 880 F.2d at 353 n.6 ("Whether the defendant's conduct rises to the level of culpability required to establish a deprivation of constitutional rights under § 1983 however, is a question for the jury."); see also Wood, supra, 879 F.2d at 588 (plaintiff raised triable questions of fact whether trooper's actions amounted to deliberate indifference towards plaintiff's safety). Appellees' claim here that the Officer's conduct was not the proximate cause of the accident is likewise a jury question.

(C)

Finally, we address the question of potential liability on the part of the City of Rogers. In Monell v. Department of Social Services, 436 U.S. 658, 690 (1977), the Supreme Court held that "[l]ocal governing bodies . . . can be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, regulation, or decision officially adopted and promulgated by that body's officers." Furthermore, local governments can be sued for "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Id. at 690-91.

In the instant case, appellants have raised material questions of fact whether it was the custom of the Rogers Police Department that officers could use their discretion in deciding whether or not to arrest intoxicated individuals, despite the state statute requiring their arrest. In failing to

detain Gregory and Fields, appellants claim that Officer Howell was acting in accordance with that custom. Accordingly, there are questions of fact with respect to the City's liability. Bielevicz v. Dubinon, 915 F.2d 845 (3d Cir. 1990); see also Ross, supra, 910 F.2d at 1431 (plaintiff adequately alleged that county had a policy of arbitrarily cutting off private sources or rescue without providing a meaningful alternative).

IV.

To summarize:

The district court erred in dismissing this § 1983 action. The Supreme Court's decision in DeShaney does not preclude a holding of a due process violation where the state intervenes to create a perilous situation. Under the facts of this case, Gregory and Fields, two intoxicated passengers, had a due process right to be protected from harm when a police officer, Officer Howell, intervened to remove their designated driver from them. There are questions of fact as to whether Officer Howell's conduct amounted to recklessness such as to have violated Gregory and Fields' constitutional rights, making summary judgment inappropriate. There also are questions of fact with respect to liability on the part of the City of Rogers.

Reversed and remanded for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

GARNER GREGORY, ET AL. PLAINTIFFS

v. Civil No. 89-5028

THE CITY OF ROGERS,
ARKANSAS DEFENDANTS

ORDER

On this 27th day of October, 1989, it appearing to the court that this court lacks jurisdiction of the subject-matter of plaintiffs' claims filed previously herein, the court sua sponte, for the reasons stated in open court, finds and concludes that the above-entitled cause should be and hereby is dismissed for lack of subject-matter jurisdiction.

IT IS SO ORDERED.

/S/ H. FRANKLIN WATERS
United States District Judge

IN THE UNTIED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

GREGORY, GARNER	)	
GREGORY, BEATE	)	Docket No.
FIELDS, DONNA MAE	)	89-5028
PLAINTIFFS,	)	Fayetteville,
V.	)	Arkansas
	)	
THE CITY OF ROGERS, AR	)	October 20, 1989
HOWELL, RONNIE, PTL.	)	
IMPERIAL CASUALTY &	)	
INDEMNITY CO.,	)	
DEFENDANTS.	)	
_____	)	

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE H. FRANKLIN
WATERS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Appearing for
the Plaintiff: Ms. Susan A. Fox

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Appearing for
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Appearing for
Imperial
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(Court called to order at 8:48 a.m)

THE COURT: Good morning, ladies and gentlemen.

We're in session out of the presence of the jury because I want to talk about a motion for summary judgment that was recently filed in this case and a response that was recently filed in this case.

I am troubled by a number of things and let me start by saying what I'm troubled about. I'm troubled, Mr. White, that the defendants did not get around to raising the jurisdictional issue, which I think is apparent on its face -- on the face of the complaint, until October 5, I believe it was, of 1989.

That of course, meant that the response of the plaintiff was not even due until the 15th. I believe that response was filed on the 16th. I'm also troubled by the fact that we were involved, and I think we had to be, in a very complex case. We did not get a chance to look at the motion for summary judgment until yesterday, late yesterday.

I want an explanation at this time as to why the defendants in this case did not raise obvious jurisdictional problems, and there are obvious jurisdictional problems, Ms. Fox and Mr. Evans, until the 5th day of October, 1989, in a case that was filed in March of 1989.

Mr. White?

MR. WHITE: Yes sir. Thank you, Your Honor.

The principal reason is that I was aware of the problems as well as I know the Court was --

THE COURT: No, the Court wasn't, unfortunately. And, unfortunately, our docket is such that we have to rely on lawyers to advise us when there is a problem in the file. We were not advised when there was a problem in this file until it was too late for us to call off the jury that's sitting out there right now if I decide to grant this motion.

MR. WHITE: Yes, sir, I understand and I deeply apologize to the Court. I was awaiting on affidavits from California, principally, that I had a very difficult time in securing. I did have the brief and the motion prepared earlier on and I simply, in fact, had to go through the case coordinator out of Norfolk, Virginia,

to jog my client to furnish me with an affidavit that I felt was necessary in this case and submit along with the motion and the brief, and I do deeply apologize to this Court.

THE COURT: Ms. Fox, I'm going to ask you if you have anything to add to your response made to the motion for summary judgment on the 16th day of October?

MS. FOX: No, Your Honor, I don't. I believe that the law and the facts are set out in my response.

THE COURT: All right. I am embarrassed for the system, ladies and gentlemen, because we have a jury sitting out there waiting to try a case that in my view clearly is not a federal case; not even any argument in my view, any viable argument in my view that there's any federal case here.

The drafters of our constitution, very wisely I suspect, said that federal courts would be courts of very limited jurisdiction. We've been told exactly the kinds of cases that we have authority to try, and we can't try every case that any individual wants in federal court for whatever reason that individual wants it in federal court.

We, the judges, have expanded our jurisdiction I think unwisely over the years. It's obvious to me that there is now becoming some sense in all of that and that is being cut back to the point that is should have been a long time ago.

If you have a case at all, Ms. Fox, that is a negligence case against the City of Rogers and its police

officers, you do not have a case of constitutional dimensions. This Court does not have authority, does not have jurisdiction to try a negligence case unless there is diversity, and there is clearly not diversity in this case.

What I understand the uncontested facts are, and no dispute whatsoever. The uncontested facts are that the plaintiff and her passenger -- his passenger, I guess it was, Garner Gregory, who is now dead obviously -- the plaintiff's decedent and his passenger were riding in a car with a man named what? Turner? Anyway, a man who was driving the car. He ran a stoplight. The City of Rogers' policeman, one of them, stopped the car. In doing a license check, they learned that the driver is wanted in Prairie Grove or somewhere for some kind of a failure to appear, some law violation. They tell him to follow them down to the police station. They take him inside. They probably do arrest him. That's not significant.

They do not, however, by any stretch of the imagination, place any controls over those two drunk individuals in the car. They could have walked off and called their mother, if they have a mother, their father, their husband, their friends, their children. They could have called anybody. They were not under any restraints whatsoever. The facts are not even in dispute in that regard. Instead, one of them chose to get under the wheel and drive off.

The police had no duty, in my view, no constitutional duty. They may have had a negligence duty. They may have had a humanitarian duty. They may have had all kinds of other duties, but that's not even arguably a case of constitutional dimensions.

Cases such as DeShaney v. Winnebago, a fairly recent Supreme Court decision that you all if you haven't read it, you should have. It contains what I believe to be the law in this respect pretty explicitly and it says -- and this is at page 10 of the advance sheet that I'm looking at. It states -- in other words, they first say states don't have any duty to take care of the public, at least a constitutional duty, to protect them from themselves; drunks like these people apparently were. And then it says:

> "It is the state's affirmative act restraining the individual free to act on his own behalf through incarceration, institutionalization or other similar restraint of personal liberty which is the deprivation of liberty triggering the protections of the due process clause; not its failure to act to protect his liberty interests against harms inflicted by other means."

There is no constitutional question in this case. There is no federal case. This case, if it's any kind of a case at all, is a case that ought to have been filed in state court. It would be -- and there is a whole line of cases. American Fire v. Finn is one of the earlier ones that say where this Court has no subject matter jurisdiction. Anything that it does is a nullity.

Either side may raise that question for the first time on appeal. In other words, if Mr. White had not finally gotten around on October 5 and raised this, and if we had tried it and if there had been a verdict in favor of the plaintiffs, and if Mr. White for the very first time got around to raising it when it was on appeal to the Court of Appeals, the Court of Appeals would have said, Judge Waters, what you did was a nullity. You wasted your

time. You wasted the jury's time. You wasted everybody's time. It's a nullity. And it would have been voided and done away with on the spot.

The Court is simply not going to, and I'm embarrassed for the jury's sake. We have somebody out there and I wish we had gotten on it earlier but we did not. I wish that the motion had been filed earlier, but it was not. We're not going to waste any more time on a case that is clearly, in my view, a state claim. It's clearly not a federal case. It's clearly not a case that we, therefore, have any jurisdiction over.

The case is going to be dismissed. The motion for summary judgement is going to be granted. I'm going to call the jury in in just a moment and advise the jury of the Court's action and send them home.

I recognize that the plaintiff objects and accepts to everything the Court said. Having said that, is there any other record to be made in relation to this? And let me assure you that it is not necessary for you to write your brief now. If you want to appeal, you do that to the Court of Appeals, of course.

Any other record to be made at this time?

MR. WHITE: No, sir, Your Honor, not for the defendant.

THE COURT: All right.

We're going to take a brief recess while you get the jury panel in, Ms. Marshal, then we're going to start again and send the jury home.

(Court recessed at 8:56 a.m. until 9:33 a.m.)

THE COURT: Ladies and gentlemen of the jury panel, I have something to report to you and then I need to ask you all something about another matter.

The case you are here to try today, is not going to be tried. The Court, as I must do, as I am obligated to do, has ruled that there is not a federal case involved in the dispute in this matter. That case has thus been dismissed. I am immensely sorry that that didn't occur before we drug you from whatever your other pursuits were down here to try this case and I apologize greatly for it.

But for several reasons, that issue did not get before the Court until it was too late to call you all. I do apologize for that and I'm going to release you all. Ask that you go back by the clerk's office for further directions in this case.

Constitutional Provisions and Statutes

Fourteenth Amendment to the Constitution of the United States

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance regulation, custom or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Arkansas Code Annotated

§ 12-11-110

Drunken, insane, and disorderly persons.

(a) It shall be the duty of all peace officers to arrest any insane or drunken person, whom they may find at large and not in the care of some discreet person, and take him before some magistrate of the county, city or town in which the arrest is made.

(b) It shall also be the duty of all peace officers to arrest any disorderly person, whom they may find creating a disturbance by noise or other disorder, and take him before some magistrate of the county, town, or city in which the arrest is made.

(c) If the arrests authorized in subsections (a) and (b) of this section are made during the night, the officer shall keep those arrested in confinement until the next morning. This shall be done unless, in the case of an insane or drunken person, the officer may deliver him into the custody of some discreet person who will undertake to restrain and take care of him. If the arrests are made in the local jurisdiction of a police or city court, the person arrested shall be taken before the judge of such court unless he is absent.

(d)(1) Upon a drunken person being brought before a magistrate, the magistrate shall have the power to order the person to be confined until he becomes sober.

(2) Upon a disorderly person being brought before him, the magistrate may require of him surety for his good behavior, and for keeping the peace for a period not exceeding one (1) year. On the failure of the disorderly person to give such security, the magistrate may commit him until he give security, but in no event is the confinement to exceed thirty (30) days.

(2)

Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

No. 92-990

In The
Supreme Court of the United States
October Term, 1992

GARNER GREGORY, ADM'R OF THE ESTATE OF JOE EDWIN GREGORY, BEATE GREGORY, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF JOE RAY GREGORY, AND DONNA MAE FIELDS,
Petitioners,

v.

CITY OF ROGERS, ARKANSAS, PTL. RONNIE HOWELL, INDIVIDUALLY AND IN HIS CAPACITY AS A POLICE OFFICER OF THE CITY OF ROGERS, ARKANSAS, AND IMPERIAL CASUALTY AND INDEMNITY CO.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 27, 1993

16 pp

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In The
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GARNER GREGORY, ADM'R OF THE ESTATE OF JOE EDWIN GREGORY, BEATE GREGORY, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF JOE RAY GREGORY, AND DONNA MAE FIELDS,
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CITY OF ROGERS, ARKANSAS, PTL. RONNIE HOWELL, INDIVIDUALLY AND IN HIS CAPACITY AS A POLICE OFFICER OF THE CITY OF ROGERS, ARKANSAS, AND IMPERIAL CASUALTY AND INDEMNITY CO.,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

Ark. Code Ann. § 12-11-110(a) provides, in pertinent

part:

> It shall bee the duty of all peace officers to arrest any insane or drunk person, who they find at large and not in the care of some discreet person, and take him before some magistrate . . . .

Ark. Code Ann. § 5-71-212(a) provides:

> A person commits the offense of public intoxication if he appears in a public place manifestly under the influence of alcohol or a controlled substance to the degree and under circumstances such that he is likely to endanger himself or other persons or property, or that he unreasonably annoys persons in his vicinity.

STATEMENT

Petitioners statement of the case is correct. Pet.Cert. at 4-7. The factual recitation from the opinion of the *en banc* United States Court of Appeals for the Eighth Circuit, *Gregory v. City of Rogers,* 974 F.2d 1008 (8th Cir. 1992) (Pet.Cir. at A3-A6, A15-A16; majority and dissent, respectively) also states the uncontested facts and the inferences that should be drawn therefrom on a motion for summary judgment. F.R.C.P. 56.

REASONS FOR DENYING THE WRIT

I

THIS CASE DOES NOT MERIT CERTIORARI BECAUSE IT DOES NOT INVOLVE AN ABUSE OF GOVERNMENTAL POWER SUFFICIENT TO INVOKE THE PROTECTIONS OF THE DUE PROCESS CLAUSE OR § 1983. THE AMENDED COMPLAINT AND THE PETITION FOR CERTIORARI ALL SOUND IN TORT TRYING TO BOOTSTRAP AN ORDINARY TORT INTO A CONSTITUTIONAL VIOLATION.

A

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," *Davidson v. Cannon, supra,* at 348; see also *Daniels v. Williams, supra,* at 331 ("'"to secure the individual from the arbitrary exercise of the powers of government,"' and 'to prevent governmental power from being used for the purposes of oppression.'") (internal citations omitted); *Parratt v. Taylor,* 451 U.S. 527, 549 (1981) (POWELL, J., concurring in result) (to prevent the "affirmative abuse of power"). Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.

DeShaney v. Winnebago County Dept. of Social Services,

489 U.S. 189, 196 (1989). There must be a violation of federal law. Even a gross violation of state law without a violation of the constitution does not state a claim under § 1983. *Collins v. City of Harker Heights, Texas,* 112 S.Ct. 1061, 1065 (1992).

In no way can this case be factually characterized as a constitutional violation by the Rogers police under *DeShaney* and *Collins*. From the amended complaint and the petition for certiorari, it is apparent that this case seeks to open a back door on *DeShaney* and other cases to purported constitutional violations in tort clothing. For example, the petition for certiorari refers to "a duty of care" interspersed in the contentions that there was an affirmative duty to Gregory and Fields. Pet.Cert. at 16, 17. "A duty of care" is only another way of saying "negligence" because it carries with it no level of intent, and that is mere negligence. (*See also* Part C, *infra.*) Negligence, of course, will not support a constitutional or § 1983 claim. *Paul v. Davis,* 424 U.S. 693, 701 (1976); *Procunier v. Navarette,* 434 U.S. 555 (1978), *Baker v. McCollan,* 443 U.S. 137 (1979); *Parratt v. Taylor,* 451 U.S. 527, 544 (1981); *Daniels v. Williams,* 474 U.S. 327, 335-36 (1986).

When state custody is involved, the person in custody has the burden of proving that the state actor acted with "deliberate indifference" to a perceived danger. *Estelle v. Gamble,* 429 U.S. 97 (1976). This since has been applied to other state action. *Canton v. Harris,* 489 U.S. 378, 388 (1989); *Collins v. City of Harker Heights, Texas, supra,* 112 S.Ct. at 1068. The facts alleged in the amended complaint, after sifted through the sieve of discovery and the summary judgment motion hardly rise to the level of "deliberate indifference" to a danger.

B

Here, further bootstrapping, petitioners seek to create a bare inference of custody to get around the language of *DeShaney* and possibly lower their burden of proof where the facts indicate otherwise. *DeShaney,* as this Court recognized, surely was a tragic case, but it still did not rise to the level of an affirmative duty on the part of the state actors:

> A State may, through its courts and legislatures, impose such affirmative duties of case and protection upon its agents as it wishes. But not "all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment." *Daniels v. Williams, supra,* 474 U.S. at 335. Because, as explained above, the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so--though calamitous in hindsight--simply does not constitute a violation of the Due Process Clause.

Id. at 262.

As tragic and compelling a case as *DeShaney* presented on the constitutional standard of care, *a fortiori,* this case can fare no better. The state actors in *DeShaney* took affirmative acts well aware of the risks, and a tragedy occurred which would not have happened if the state actors had thought it out better and not put poor Joshua back into his father's hands. Nevertheless, no cause of action is stated here under *DeShaney* or *Estelle v. Gamble,* because Officer Howell did nothing to increase any risk of harm to Gregory and Fields. They were intelligent enough to have

a designated driver in Turner, but they were not smart enough to remain with it. They chose to drive away from the curb in front of the Rogers Police Department while drunk and at a high rate of speed. He undertook no affirmative duty as to them, and the constitution does not imply one. Where in the constitution is the government expected to protect people from their own folly when the government has done nothing to aid in the creation of that folly?

C

Petitioners are confined to the phrase "duty of care"; *see* part A, *supra*; by the law as it has developed thus far. A better phrase may be the "constitutional duty of care."

Respondents concede that the constitutional duty of care does need clarification in this Court since this issue was left open in *DeShaney, supra,* at 202 n.10 and *Daniels, supra,* at 334 n.3. *Estelle* and *Collins,* however, strongly indicate that this duty is "deliberate indifference."

The facts of this case give the Court the opportunity to close this asserted back door to *DeShaney,* determine whatever level of intent is required between negligent acts and intentional acts for § 1983 violations, and still affirm the decision below because, under whatever standard the Court may apply, the petitioners have not satisfied and cannot satisfy it in this case.

And, if the Court grants certiorari, a pandora's box of subissues will have to be addressed:

1. What will this constitutional duty of care be? (1) gross negligence, (2) reckless disregard, (3) intentional

disregard or deliberate indifference, or (4) intentional acts? How will it be defined in the context of this case:

a. Did Howell have a duty to arrest Gregory and Fields for public intoxication? Stated another way, does a person have a constitutional right to be arrested where the officer has discretion not to or the officer could be sued for false arrest if he did?

Petitioners assert the remarkable proposition that Howell had a constitutional duty to arrest them. They rely on Ark. Code Ann. § 12-11-110(a), adopted in 1869, which provides, in pertinent part:

> It shall bee the duty of all peace officers to arrest any insane or drunk person, who they find at large and not in the care of some discreet person, and take him before some magistrate . . . .

They overlook, however, a provision of the 1975 Arkansas Criminal Code, Ark. Code Ann. § 5-71-212(a), which provides:

> A person commits the offense of public intoxication if he appears in a public place manifestly under the influence of alcohol or a controlled substance to the degree and under circumstances such that he is likely to endanger himself or other persons or property, or that he unreasonably annoys persons in his vicinity.

When this statute was adopted, the Arkansas General Assembly specifically rejected prior law and required "intoxication-plus" by adding additional elements. Mere drunks

were no longer to be arrested. *Id. Commentary.* It is axiomatic that the 1975 enactment controls. The customary practice in Arkansas is not to arrest passengers during a DWI arrests, for example, unless the passenger is disorder or a danger to himself or others. Also, jail space is at a premium everywhere in the nation. The police have this discretion all over the country.

Petitioners had no constitutional right to be arrested. *McKee v. City of Rockwell,* 877 F.2d 409, 414 (5th Cir. 1989). *See also Auclair v. State,* 660 P.2d 1156, 1162 (Wyo.), *cert. denied and app. dismissed,* 464 U.S. 909 (1983) (no constitutional right to be arrested at the earliest opportunity). Even if they did, where can the Court draw the line? Just how drunk is drunk? Will officers act at their peril to arrest to avoid liability from this type of occurrence and then be held liable for false arrest if they are wrong? Granting qualified immunity is no answer because Fourth Amendment rights would be denigrated to create a new standard of care. The implications of this contention are horrendous. If petitioners prevail on their claim, police officers nationwide will be virtually compelled to not exercise discretion not to arrest because there apparently would then be a duty to arrest. Potentially every police-citizen contact could ultimately be questioned under the doctrine advanced by petitioner in this case.

b. Are officers effectively obligated to make every traffic stop a full custodial arrest of the occupants to be sure they are not drunk? The next extension of this case would be to constitutionalizing the failure to arrest a driver whom the police had some reason to believe might have been drunk after that drunk driver has an accident with a third party. How far should some concept of foreseeabili-

ty extend under the constitution?

c. Did he have a duty to do a full body search of Turner to be sure that he had the keys to the car? Is that not an unreasonable search of Turner under the circumstances? If not, will officers be compelled to be more intrusive of detainees than they otherwise need to? What if he had Turner's keys but Gregory had his own set? Where does foreseeability fit into the calculus?

d. Should a different standard apply because the car was Gregory's?

e. Can Howell constitutionally assume that Gregory and Fields were responsible for their own actions since they were responsible enough to have a designated driver?

f. Does or should the constitution make a police officer the guardian of every person he comes into contact with? *See Collins, supra,* at 1070 ("the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attending living together in society.'" *Daniels v. Williams,* 474 U.S. at 332").

g. Where does this duty begin and end?

h. How does comparative fault enter into these issues? Here, Gregory and Fields are clearly far more at fault for their injuries than Howell, if he has any fault at all. Arkansas is a comparative fault state, and that should have to apply as well under 42 U.S.C. § 1988, or should it? Would the Due Process Clause override comparative fault? Could clear comparative fault take a case like this

one out on summary judgment? Is the judgment below correct simply on the question of comparative fault?

i. What about a "but for" test? Is a "but for" test is foeclosed by *DeShaney?*

2. How does the Court characterize Office Howell's conduct? Where does Officer Howell's state of mind fall in this continuum? What did he do that was grossly negligence, reckless, or intentional against Gregory and Fields? Beyond any common law duty of care, nothing. *Arguendo,* the best inference that can be drawn from these facts is that he can only be said to be guilty mere negligence.[1] That, of course, fails to state a constitutional claim.

II

THIS CASE DOES NOT MERIT CERTIORARI: THERE IS NO CONFLICT IN THE CIRCUITS AND THE DECISION IS NOT CONTRARY TO *DESHANEY, ESTELLE V. GAMBLE,* OR OTHER CASES.

A

There is no conflict in the circuits. While the decisions cited by petitioner differ in the level of intent re-

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[1] The amended complaint sounds only in tort with creative pleading designed to make this tort fly like a "constitutional tort," if there should even be such a phrase. We are dealing with alleged constitutional violations not constitutional torts. The latter phrase should thus be retired.

quired by the state actor, this is not material to this case. Under whatever level of intent more than mere negligence that one applies to the facts of this case, the outcome was correct.

Each of the cases cited by petitioners or decided by the Eighth Circuit involved some affirmative act of the state actor that put the plaintiff in actual danger. This case involves no such facts, and that absolutely separates this case from *DeShaney v. Winnebago County Dept. of Social Services, supra,* and *Collins v. City of Harlan Heights, Texas, supra. See, e.g., Freeman v. Ferguson,* 911 F.2d 52 (8th Cir.1990) (police chief directed officers not to interfere with person who ultimately killed his victims; duty created; distinguishing *DeShaney* because state actors condoned the violence); *Wood v. Ostrander,* 879 F.2d 583, 589-90 (9th Cir.1989), *cert. denied* 111 S.Ct. 341 (1990) (officer arrested driver of car, impounded car, and left female passenger in a high crime area to fend for herself; she hitchhiked and was raped; duty created because officer "affirmatively placed plaintiff in a position of danger; pre-*DeShaney*); *Cornelius v. Town of Highland Lake,* 880 F.2d 348, 356 (11th Cir.1989), *cert. denied* 110 S.Ct. 1784 (1990) (plaintiff was abducted by unsupervised work release inmates; *DeShaney* distinguished); *White v. Rochford,* 592 F.2d 381 (7th Cir.1979) (similar to *Wood;* children were left by police on the side of a busy Chicago expressway on a cold night after their parent was arrested which resulted in physical and emotional injury to children).

B

As previously stated, the decision of the Court of

Appeals is correct under *DeShaney, Estelle v. Gamble,* and *Collins,* so there is no ground for granting certiorari there.

CONCLUSION

The petition for writ of certiorari should be denied. The Court could, however, grant certiorari to affirm the decision of the Court of Appeals.

Respectfully submitted,

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(3)

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No. 92-990

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1992

GARNER GREGORY, ADMINISTRATOR OF THE ESTATE OF JOE EDWIN GREGORY; BEATE GREGORY, individually and as mother and next friend of JOE RAY GREGORY; and DONNA MAE FIELDS, Petitioners,

v.

THE CITY OF ROGERS, ARKANSAS; PTL. RONNIE HOWELL, individually and in his capacity as a police officer of the City of Rogers, Arkansas; and IMPERIAL CASUALTY AND INDEMNITY CO., Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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No. 92-990

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REPLY BRIEF

INTRODUCTION

Respondents' Brief in Opposition is really a brief on the merits. Even as such, Respondents' brief demonstrates the seriousness of the Questions Presented and the stark reality that these questions *and* many of Respondents'

rhetorical "pandora's box of subissues," *see* Brief in Opposition at 9-13, should be answered by this Court.

The District Court's Order and bench ruling dismissing this case are unreasoned and include no findings of fact. The District Court was reversed by the unanimous Eighth Circuit Panel, which in turn was reversed by the six judge ***en banc*** majority. The six to five (actually six, counting Judge Timbers) division of the Eighth Circuit, sitting ***en banc***, itself demonstrates confusion among the lower federal courts as to the correct answers to the issues in this case.

Respondents' flawed analysis and misunderstanding of Section 1983 and constitutional rights jurisprudence further demonstrate the importance of these issues. Indeed, Respondents themselves correctly recognize that in this case, this Court should clarify the "constitutional duty of care" owed by state actors under the Due Process clause of the Fourteenth Amendment, to a private person's interest in personal security. Brief in Opposition at 9.

This concession involves the Second and Third questions presented in the Petition. On the basis of the concession alone, plenary review is appropriate. Similarly, this Court should grant plenary review of the questions presented to which Respondents made no response, *i.e.*, the First (summary judgment standards) and Fourth (municipal liability in absence of individual actor liability) questions. All four Questions Presented are interrelated.

I.

THIS COURT SHOULD CLARIFY THE DUE PROCESS STANDARD(S) OF CARE THAT STATE ACTORS OWE TO PRIVATE PERSONS WHO ARE NOT TAKEN INTO CUSTODY AND WHO ARE NOT GOVERNMENT EMPLOYEES, WHEN THE STATE ACTORS HAVE TAKEN AFFIRMATIVE ACTIONS THAT INCREASE THE RISK TO SUCH PRIVATE PERSONS' PERSONAL SECURITY.

Disregarding this Court's decision in *Collins v. City of Harker Heights*, 503 U.S. ___, 117 L. Ed. 2d 261 (1992), Respondents incorrectly argue that "This Case Does Not Merit Certiorari Because It Does Not Involve An Abuse Of Governmental Power Sufficient To Invoke The Protections Of The Due Process Clause Or § 1983." Brief in Opposition at 6. As *Collins* instructs, a Section 1983 plaintiff must allege and prove only that a "person," acting under color of state law, "caused" injury to the plaintiff through a violation of the federal Constitution or laws. *See* 117 L. Ed. 2d at 269-70. Abuse of governmental power is *not* a separate element of a Section 1983 claim. *Id.*

Respondents rely largely on *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). That case teaches only that the injury to a Section 1983 plaintiff must be "caused" by an "affirmative" act performed by the state actor, rather than by the act of a private person. The state's mere failure to act ordinarily is insufficient to engage due process protections. *Compare* Brief in Opposition at 6-8.

In *Deshaney*, however, this Court did not address the issue whether the state proximately causes injury to a private person's federal rights where the state actor affirmatively places that person in a position of danger the person would not otherwise have faced. *See* 489 U.S. at 201 n.9. Petition at 14-16. Respondents incorrectly argue that there is no conflict among the Circuits *as to the circumstances in which* such conduct by state actors constitutes a violation of a due process right to personal security, of a private person. *Compare* Petition at 14-16 *with* Brief in Opposition at 13-15.

Most significantly, the parties agree that this Court has not yet decided what substantive due process standard of care government actors owe a private person, who is not in government custody or employment, and who is injured because the government actor has placed the person in a position of physical danger. "Respondents concede that the constitutional duty of care does need clarification in this Court since this issue was left open in *Deshaney*, *supra*, at 202 n.10 and *Daniels* [*v. Williams*, 474 U.S. 327] at 334 n.3 [(1986)]." Brief in Opposition at 9. *Accord* Petition at 17-19.

Respondents argue that the standard should be "deliberate indifference." *See* Brief in Opposition at 9. That may well be correct; but it is by no means certain. The correct standard could be "recklessness" or "gross negligence." *See Daniels v. Williams*, 474 U.S. at 334 n.3; *see also Whitley v. Albers*, 475 U.S. 312, 327 (1986). It could even be "reasonableness," in some circumstances. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989); *Brower v. County of Inyo*, 489 U.S. 593 (1989).

To properly address these issues, the Court should grant the Petition for Writ of Certiorari, and the case should be set for full briefing and oral argument.

II.

THE COURT SHOULD GRANT PLENARY REVIEW OF WHETHER A MUNICIPALITY MAY BE LIABLE UNDER SECTION 1983 FOR VIOLATING A PERSON'S FEDERAL RIGHTS WHEN NO AGENT OF THE MUNICIPALITY HAS ALSO VIOLATED THAT PERSON'S FEDERAL RIGHTS, AS WELL AS WHETHER ARKANSAS' MANDATORY DUTY CIVIL DETENTION STATUTE REQUIRING PEACE OFFICERS TO DETAIN PUBLICLY INTOXICATED PERSONS CREATES A DUE PROCESS LIBERTY INTEREST.

Respondents misunderstand the significance in this case of Ark. Code Ann. Section 12-11-110(a), a civil law provision, that places a mandatory duty on "all peace officers to arrest any insane or drunk person whom they shall find at large and not in the care of some discrete person, and take him before some magistrate . . . [for civil detention or other such protective action]." Petition at A-48 to A-49. *Compare* Brief in Opposition at 10-11, *with* Petition at 22-23.

First, Respondents' reliance on the more relaxed or discretionary terms of Ark. Code Ann. Section 5-71-212(a), the 1975 version of the Arkansas *Criminal* Code is inappropriate. Appendix hereto at A-1. *See* Brief in

Opposition at 10-11. That statute identifies elements for which a person is to be *arrested*, charged and convicted of a crime. It does not control or limit the mandatory civil detention requirements of Ark. Code Ann. Section 12-11-110(a).

Second, the *Deshaney* Court specifically declined to consider whether a mandatory duty type statute, such as Section 12-11-110(a) creates a constitutionally protected liberty interest because the issue was raised for the first time on appeal to this Court. 489 U.S. at 195 n.2. *See also Collins*, 117 L. Ed. 2d at 275-76, where the Court only assumed the existence of a "liberty" interest. This issue was raised below in this case, and is fairly included in the scope of Questions Presented and the Petition. *See* Petition at 20-24. Hence, the case at bar presents an appropriate occasion for the Court to determine the effect of the violation of a mandatory duty statute in the context of a Section 1983 action.

Third, Respondent Howell's failure to enforce the mandatory civil detention provision may well have a bearing on his liability under Section 1983. To implicate Howell in a constitutional violation on this ground, Petitioners may have to prove that he knew or should have known that Decedent and Petitioner Fields were intoxicated and Howell ignored that fact to avoid the paperwork or other inconvenience of enforcing the state mandatory duty statute. *Cf. Collins*, 117 L. Ed. 2d at 273. Perhaps all the Petitioners may have to prove is that Howell acted recklessly, with gross negligence or with deliberate indifference. *See Daniels v. Williams*, 474 U.S. at 334 n.3. That is for this Court to decide.

Fourth, more to point, Petitioners have alleged, and are prepared to prove, that Respondent City of Rogers proximately "caused" Petitioner's injuries, through its policy and custom of inadequate training and supervision of its peace officers, including Respondent Howell. This policy and custom included the City's condoning such peace officers' disregard of their mandatory obligations to detain (as opposed to arrest) publicly intoxicated persons. *See* Ark. Code Ann. Section 12-11-110(a).

Respondents now virtually concede the existence of the alleged policy or custom. *See* Brief in Opposition at 11. If such a policy or custom exists, and was at play in this case, Petitioners will have established the substitute for *respondeat superior* that is necessary to hold the City of Rogers liable. *See Collins*, 117 L. Ed. 2d at 272-73. Petitioners anticipate no difficulty in proving that through implementation of these policies or customs the City of Rogers' was deliberately indifferent to the federal rights of persons, such as Decedent and Petitioner Fields, with whom its peace officers were likely to come into contact. *See City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989).

Assuming Petitioners' proof, Respondents do not deny that this case presents an important unresolved issue on which there is a conflict among the Circuits, namely, whether the municipality itself may be liable under Section 1983 even if it turns out that Respondent Howell is not liable. *See* Petition at 20-24.

CONCLUSION

For the foregoing reasons, and those stated in the Petition for Writ of Certiorari, the Petition for Writ of

Certiorari should be granted and the case should be scheduled for plenary briefing and argument.

Dated: February 12, 1993

Respectfully submitted

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Arkansas Code Annotated (Criminal Offenses)

5-71-212. Public Intoxication.

(a) A person commits the offense of public intoxication if he appears in a public place manifestly under the influence of alcohol or a controlled substance to the degree and under circumstances such that he is likely to endanger himself or other persons or property, or that he unreasonably annoys persons in his vicinity.

(b) Public intoxication is a Class C misdemeanor.

(c) A person commits the offense of drinking in public if that person consumes any alcoholic beverages in any public place, on any highway, or street, or upon any passenger coach, streetcar, or in or upon any vehicle commonly used for the transportation of passengers, or in or about any depot, platform, waiting station or room, or other public place other than a place of business licensed to sell alcoholic beverages for consumption on the premises.

(d) Drinking in public is a Class D misdemeanor.

(e) The provisions of this section shall not be construed to prohibit or restrict the consumption of alcoholic beverages when consumed as a part of a recognized religious ceremony or ritual.